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"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ'ὀρθῶς ἔχον ὀφθῃ καὶ τὸ χρήσιμον."—Arist. *Pol.* II. 1.

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MR. ELIHU ROOT.

THE portrait which appears in this number of the Journal is that of Mr. Elihu Root, the distinguished American lawyer and statesman. His varied career is too familiar to be here described in detail. Successful at the New York Bar, especially in corporation cases, he first became widely known in Europe as Secretary of War in the Cabinets of Presidents McKinley and Roosevelt, and in that position he showed himself not only an organiser and administrator of rare capacity, but in the "Instructions" which he drew up for the Philippines, he proved himself to be an enlightened legislator. No less remarkable was his work while Secretary of State in President Roosevelt's second Cabinet. The "organiser of victory" was the zealous advocate of peace, the courteous and prudent diplomatist, and a true friend to England. In the arbitration respecting the North Atlantic fisheries Mr. Root was the leading counsel for the United States, and it is but right to say that his temperate argument was the most cogent presentment of their case. The powerful and courageous speech which he lately made in the Senate against what appeared to him a signal breach of international good faith with respect to the Panama Canal will long be remembered to his honour. Mr. Root is an impressive speaker, of a type different from that which we usually associate with the American Bar. His model, if he has had any, has not been Pinkney or Webster, or Rufus or Joseph Choate. His style is not ornate, nor are his speeches lighted up with gleams of humour or enlivened with felicitous anecdotes. But there is in them a certain ethos, a persuasive earnestness, an austerity of tone which command and arrest attention and recall the words and manner of John Marshall and the best traditions of American public life.

HIGHER NATIONALITY.

A STUDY IN LAW AND ETHICS.[1]

[*Contributed by* VISCOUNT HALDANE OF CLOAN, *Lord Chancellor of Great Britain.*]

IT is with genuine pleasure that I find myself among my fellow-lawyers of the New World. But my satisfaction is tempered by a sense of embarrassment. There is a multitude of topics on which it would be most natural that I should seek to touch. If, however, I am to use to any purpose the opportunity which you have accorded me, I must exclude all but one or two of them. For in an hour like this, as in most other times of endeavour, he who would accomplish anything must limit himself. What I have to say will therefore be confined to the suggestion of little more than a single thought, and to its development and illustration with materials that lie to hand. I wish to lay before you a result at which I have arrived after reflection, and to submit it for your consideration with such capacity as I possess. For the occasion is as rare as it is important. Around me I see assembled some of the most distinguished figures in the public life of this Continent; men who throughout their careers have combined law with statesmanship, and who have exercised a potent influence in the fashioning of opinion and of policy. The law is indeed a calling notable for the individualities it has produced. Their production has counted for much in the past of the three nations that are represented at this meeting, and it means much for them to-day.

Jurisprudence as a Bond of Unity.—What one who finds himself face to face with this assemblage naturally thinks of is the future of these three nations, a future that may depend largely on the influence of men with opportunities such as are ours. The United States and Canada and Great Britain together form a group which is unique, unique because of its common inheritance in traditions, in surroundings, and in ideals. And nowhere is the character of this common inheritance more apparent than in the region of jurisprudence. The lawyers of the three countries think for the most part alike. At no period has political divergence prevented this fact from being strikingly apparent. Where the letter of their law is different the spirit is

[1] An address delivered before the American Bar Association at Montreal on September 1, 1913.

yet the same, and it has been so always. As I speak of the historical tradition of our great calling, and of what appears likely to be its record in days to come, it seems to me that we who are here gathered may well proclaim, in the words of the Spartans, "We are what you were, we shall be what you are." It is this identity of spirit, largely due to a past which the lawyers of the group have inherited jointly, that not only forms a bond of union, but furnishes them with an influence that can hardly be reproduced in other nations. That is why I feel at liberty to seek to look ahead. I will ask you to consider with me whether we, who have in days gone by moulded their laws, are not called on to try in days that lie in front to mould opinion in yet another form, and so encourage the nations of this group to develop and recognise a reliable character in the obligations they assume towards each other. For it may be that there are relations possible within such a group of nations as is ours that are not possible for nations more isolated from each other and lacking in our identity of history and spirit. Canada and Great Britain on the one hand and the United States on the other, with their common language, their common interests, and their common ends, form something resembling a single society. If there be such a society, it may develop within itself a foundation for international faith of a kind that is new in the history of the world. Without interfering with the freedom of action of these great countries or the independence of their constitutions, it may be possible to establish a true unison between Sovereign States. This unison will doubtless, if it ever comes into complete being, have its witnesses in treaties and written agreements. But such documents can never of themselves constitute it. Its substance, if it is to be realised, must be sought for deeper down in an intimate social life. I have never been without hope that the future development of the world may bring all the nations that compose it nearer together, so that they will progressively cease to desire to hold each other at arm's length. But such an approximation can only come about very gradually, if I read the signs of the times aright. It seems to me to be far less likely of definite realisation than in the case of a group united by ties such as those of which I have spoken. Well, the growth of such a future is at least conceivable. The substance of some of the things I am going to say about its conception, and about the way by which that conception may become real, is as old as Plato. Yet the principles and facts to which I shall have to refer appear to me to be often overlooked by those to whom they might well appear obvious. Perhaps the reason is the deadening effect of that conventional atmosphere out of which few men in public life succeed in completely escaping. We can best assist in the freshening of that atmosphere by omitting no opportunity of trying to think rightly, and thereby to contribute to the fashioning of a more hopeful and resolute kind of public opinion. For, as some one has said, "L'opinion générale dirige l'autorité, quels qu'on soient les dépositoires."

The Office of Lord Chancellor.—The chance of laying before such an audience as this what was in my mind made the invitation which came

from the Bar Association and from the heads of our great profession, both in Canada and the United States, a highly attractive one. But before I could accept it I had to obtain the permission of my Sovereign; for, as you know, the Lord Chancellor is also *Custos Sigilli*, the Keeper of that Great Seal under which alone supreme executive acts of the British Crown can be done. It is an instrument he must neither quit without special authority, nor carry out of the realm. The head of a predecessor of mine, Cardinal Wolsey, was in peril because he was so daring as to take the Great Seal across the water to Calais, when he ought instead to have asked his Sovereign to put it into Commission.

Well, the *Clavis Regni* was on the present occasion put safely into Commission before I left, and I am privileged to be here with a comfortable constitutional conscience. But the King has done more than graciously approve of my leaving British shores. I am the bearer to you of a message from him which I will now read:

> I have given my Lord Chancellor permission to cross the seas, so that he may address the meeting at Montreal. I have asked him to convey from me to that great meeting of the lawyers of the United States and of Canada my best wishes for its success. I entertain the hope that the deliberations of the distinguished men of both countries who are to assemble at Montreal may add yet further to the esteem and goodwill which the people of the United States and of Canada and the United Kingdom have for each other.

The King's Message.—The King's message forms a text for what I have to say, and, having conveyed that message to you, I propose in the first place to turn to the reasons which make me think that the class to which you and I belong has a peculiar and extensive responsibility as regards the future relations of the three countries. But these reasons turn on the position which Courts of Law hold in Anglo-Saxon constitutions, and in entering on them I must recall to you the character of the tradition that tends to fashion a common mind in you and me as members of a profession that has exercised a profound influence on Anglo-Saxon society. It is not difficult in an assemblage of lawyers such as we are to realise the process by which our customary habits of thought have come into being and bind us together. The spirit of the jurisprudence which is ours, of the system which we apply to the regulation of human affairs in Canada, in the United States, and in Great Britain alike, is different from that which obtains in other countries. It is its very peculiarity that lends to it its potency, and it is worth while to make explicit what the spirit of our law really means for us.

The Common Law of England.—I read the other day the reflections of a foreign thinker on what seemed to him the barbarism of the entire system of English jurisprudence, in its essence judge-made and not based on the scientific foundation of a code. I do not wonder at such reflections. There is a gulf fixed between the method of a code and such procedure

as that of Chief Justice Holt in *Coggs* v. *Bernard*, of Chief Justice Pratt in *Armory* v. *Delamirie*, and of Lord Mansfield when he defined the count for money had and received. A stranger to the spirit of the law as it was evolved through centuries in England will always find its history a curious one. Looking first at the early English Common Law, its most striking feature is the enormous extent to which its founders concerned themselves with remedies before settling the substantive rules for breach of which the remedies were required. Nowhere else, unless perhaps in the law of ancient Rome, do we see such a spectacle of legal writs making legal rights. Of the system of the Common Law there is a saying of Mr. Justice Wendell Holmes which is profoundly true: "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intentions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." As the distinguished writer whom I have quoted tells us, we cannot, without the closest application of the historical method, comprehend the genesis and evolution of the English Common Law. Its paradox is that in its beginnings the forms of action came before the substance. It is in the history of English remedies that we have to study the growth of rights. I recall a notable sentence in one of Sir Henry Maine's books. "So great," he declares, "is the ascendency of the Law of Actions in the infancy of Courts of Justice, that substantive law has, at first, the look of being gradually secreted in the interstices of procedure." I will add to his observation this: that all our reforms notwithstanding, the dead hands of the old forms of action still rest firmly upon us. In logic the substantive conceptions ought of course to have preceded these forms. But the historical sequence has been different, for reasons with which every competent student of early English history is familiar. The phenomenon is no uncommon one. The time spirit and the spirit of logical form do not always, in a world where the contingent is ever obtruding itself, travel hand in hand. The germs of substantive law were indeed present as potential forces from the beginning, but they did not grow into life until later on. And therefore forms of action have thrust themselves forward with undue prominence. That is why the understanding of our law is, even for the practitioner of to-day, inseparable from knowledge of its history.

The History of Equity.—As with the Common Law, so it is with Equity. To know the principles of Equity is to know the history of the Courts in which it has been administered, and especially the history of the office which at present I chance myself to hold. Between law and equity there is no other true line of demarcation. The King was the fountain of justice. But to get justice at his hands it was necessary first of all to

obtain the King's writ. As Bracton declared, "non potest quis sine brevi agere." But the King could not personally look after the department where such writs were to be obtained. At the head of this, his Chancery, he therefore placed a Chancellor, usually a bishop, but sometimes an archbishop, and even a cardinal, for in these days the Church had a grip which to a Lord Chancellor of the twentieth century is unfamiliar. At first the holder of the office was not a judge. But he was keeper of the King's conscience, and his business was to see that the King's subjects had remedies when he considered that they had suffered wrongs. Consequently he began to invent new writs, and finally to develop remedies which were not confined by the rigid precedents of the Common Law. Thus he soon became a judge. When he found that he could not grant a Common Law writ he took to summoning people before him and to searching their consciences. He inquired, for instance, as to trusts which they were said to have undertaken, and as the result of his inquiries rights and obligations unknown to the Common Law were born in his Court of Conscience. You see at a glance how susceptible such a practice was of development into a complete system of Equity. You would expect, moreover, to find that the ecclesiastical atmosphere in which my official predecessors lived would influence the forms in which they moulded their special system of jurisprudence. This did indeed happen; but even in those days the atmosphere was not merely ecclesiastical. For the Lord High Chancellor in the household of an early English monarch was the King's domestic chaplain, and as, unlike his fellow-servants in the household, the Lord High Steward and the Lord Great Chamberlain, he always possessed the by no means common advantage of being able to read and write, he acted as the King's political secretary. He used, it seems, in early days to live in the palace, and he had a regular daily allowance. From one of the records it appears that his wages were five shillings, a simnel cake, two seasoned simnels, one sextary of clear wine, one sextary of household wine, one large wax candle, and forty small pieces of candle. In the time of Henry II. the modern treasury spirit appears to have begun to walk abroad, for in the records the allowance of five shillings appears as if subjected to a reduction. If he dined away from the palace, *si extra domum comederit*, and was thereby forced to provide extras, then indeed he got his five shillings. But if he dined at home, *intra domum*, he was not allowed more than three shillings and sixpence. The advantage of his position was, however, that, living in the palace, he was always at the King's ear. He kept the Great Seal through which all great acts of state were manifested. Indeed it was the custody of the Great Seal that made him Chancellor. Even to-day this is the constitutional usage. When I myself was made Lord Chancellor the appointment was effected, not by Letters Patent, nor by writing under the Sign Manual, nor even by words spoken, but by the Sovereign making a simple delivery of the Great Seal into my hands while I knelt before him at Buckingham Palace in the presence of

the Privy Council. The reign of Charles I. saw the last of the ecclesiastical chancellors. The slight sketch of the earlier period which I have drawn shows that in these times there might well have developed a great divergence of Equity from the Common Law, under the influence of the Canon and Roman laws to which ecclesiastical chancellors would naturally turn. In the old Courts of Equity it was natural that a different atmosphere from that of the Common Law Courts should be breathed. But with the gradual drawing together of the Courts of Law and Equity under lay chancellors the difference of atmosphere disappears, and we see the two systems becoming fused into one.

Judge-made Law.—The moral of the whole story is the hopelessness of attempting to study Anglo-Saxon jurisprudence apart from the history of its growth and of the characters of the judges who created it. It is by no accident that among Anglo-Saxon lawyers the law does not assume the form of codes, but is largely judge-made. We have statutory codes for portions of the field which we have to cover. But those statutory codes come, not at the beginning, but at the end. For the most part the law has already been made by those who practise it before the codes embody it. Such codes with us arrive only with the close of the day, after its heat and burden have been borne, and when the journey is already near its end. I have spoken of a spirit and of traditions which have been apparent in English law. But they have made their influence felt elsewhere. My judicial colleagues in the province of Quebec administer a system which is partly embodied in a great modern code, and partly depends on old French law of the period of Louis XIV. They apply, moreover, a good deal of the public and commercial law of England. The relation of the code to these systems has given rise to some controversies. What I have gathered, however, when sitting in the Judicial Committee of the Privy Council, is that a spirit not very different from that of the English lawyers has prevailed in Quebec. The influence of the judges in moulding the law, and of legal opinion in fashioning the shape which it should take, seem to me to have been hardly less apparent in Quebec than elsewhere in Canada. Indeed the several systems of our group of nations, however those systems have originated, everywhere show a similar spirit, and disclose the power of our lawyers in creating and developing the law as well as in changing it, a power which has been more exercised outside the legislature than within it. It is surely because the lawyers of the New World have an influence so potent and so easily wielded that they have been able to use it copiously in a wider field of public affairs than that of mere jurisprudence. It is very striking to the observer to see how many of the names of those who have controlled the currents of public opinion in the United States and Canada alike have been the names of famous lawyers. I think this has been so partly because the tradition and spirit of the law were always what I have described, and different from that on the Continent of Europe. But it has also been

so because, in consequence of that tradition and spirit, the vocation of the lawyer has not, as on the Continent of Europe, been that of a segregated profession of interpreters, but a vocation which has placed him at the very heart of affairs. In the United Kingdom this has happened in the same fashion, yet hardly to so great an extent, because there has been competition of other and powerful classes whose tradition has been to devote their lives to a Parliamentary career. But in the case of all three nations it is profoundly true that, as was said by the present President of the United States in 1910, in an address delivered to this very Association, "the country must find lawyers of the right sort and the old spirit to advise it, or it must stumble through a very chaos of blind experiment." "It never," he went on to add, "needed lawyers who are also statesmen more than it needs them now—needs them in its courts, in its legislatures, in its seats of executive authority—lawyers who can think in the terms of society itself."

The Responsibility of Lawyers.—This at least is evident, that if you and I belong to a great calling, it is a calling in which we have a great responsibility. We can do much to influence opinion, and the history of our law and the character of our tradition render it easy for us to attain to that unity in habit of thought and sentiment which is the first condition of combined action. That is why I do not hesitate to speak to you as I am doing.

The General Will.—And having said so much, I now submit to you my second point. The law has grown by development through the influence of the opinion of society guided by its skilled advisers. But the law forms only a small part of the system of rules by which the conduct of the citizens of a state is regulated. Law, properly so called, whether civil or criminal, means essentially those rules of conduct which are expressly and publicly laid down by the sovereign will of the state, and are enforced by the sanction of compulsion. Law, however, imports something more than this. As I have already remarked, its full significance cannot be understood apart from the history and spirit of the nation whose law it is. Moreover, it has a real relation to the obligations even of conscience, as well as to something else which I shall presently refer to as the General Will of Society. In short, if its full significance is to be appreciated, larger conceptions than those of the mere lawyer are essential, conceptions which come to us from the moralist and the sociologist, and without which we cannot see fully how the genesis of law has come about. That is where writers like Bentham and Austin are deficient. One cannot read a great book like the *Esprit des Lois* without seeing that Montesquieu had a deeper insight than Bentham or Austin, and that he had already grasped a truth which, in Great Britain at all events, was to be forgotten for a time.

Sittlichkeit.—Besides the rules and sanctions which belong to law and legality, there are other rules, with a different kind of sanction, which also influence conduct. I have spoken of conscience, and conscience, in the

strict sense of the word, has its own court. But the tribunal of conscience is a private one, and its jurisdiction is limited to the individual whose conscience it is. The moral rules enjoined by the private conscience may be the very highest of all. But they are enforced only by an inward and private tribunal. Their sanction is subjective and not binding in the same way on all men. The very loftiness of the motive which makes a man love his neighbour more than himself, or sell all his goods in order that he may obey a great and inward call, renders that motive in the highest cases incapable of being made a rule of universal application in any positive form. And so it was that the foundation on which one of the greatest of modern moralists, Immanuel Kant, sought to base his ethical system, had to be revised by his successors. For it was found to reduce itself to little more than a negative and therefore barren obligation to act at all times from maxims fit for law universal, maxims which, because merely negative, turned out to be inadequate as guides through the field of daily conduct. In point of fact that field is covered, in the case of the citizen, only to a small extent by law and legality on the one hand, and by the dictates of the individual conscience on the other. There is a more extensive system of guidance which regulates conduct and which differs from both in its character and sanction. It applies, like law, to all the members of a society alike, without distinction of persons. It resembles the morality of conscience in that it is enforced by no legal compulsion. In the English language we have no name for it, and this is unfortunate, for the lack of a distinctive name has occasioned confusion both of thought and of expression. German writers have, however, marked out the system to which I refer, and have given it the name of "Sittlichkeit." In his book, *Der Zweck im Recht*, Rudolph von Jhering, a famous professor at Göttingen, with whose figure I was familiar when I was a student there nearly forty years ago, pointed out, in the part which he devoted to the subject of "Sittlichkeit," that it was the merit of the German language to have been the only one to find a really distinctive and scientific expression for it. "Sittlichkeit" is the system of habitual or customary conduct, ethical rather than legal, which embraces all those obligations of the citizen which it is "bad form" or "not the thing" to disregard. Indeed, regard for these obligations is frequently enjoined merely by the social penalty of being "cut" or looked on askance. And yet the system is so generally accepted, and is held in so high regard, that no one can venture to disregard it without in some way suffering at the hands of his neighbours for so doing. If a man maltreats his wife and children, or habitually jostles his fellow-citizen in the street, or does things flagrantly selfish or in bad taste, he is pretty sure to find himself in a minority and the worse off in the end. Not only does it not pay to do these things, but the decent man does not wish to do them. A feeling analogous to what arises from the dictates of his more private and individual conscience restrains him. He finds himself so restrained in the ordinary affairs of daily life. But he

is guided in his conduct by no mere inward feeling, as in the case of conscience. Conscience and, for that matter, law overlap parts of the sphere of social obligation about which I am speaking. A rule of conduct may, indeed, appear in more than one sphere, and may consequently have a twofold sanction. But the guide to which the citizen mostly looks is just the standard recognised by the community, a community made up mainly of those fellow-citizens whose good opinion he respects and desires to have. He has everywhere round him an object-lesson in the conduct of decent people towards each other and towards the community to which they belong. Without such conduct and the restraints which it imposes there could be no tolerable social life, and real freedom from interference would not be enjoyed. It is the instinctive sense of what to do and what not to do in daily life and behaviour that is the source of liberty and ease. And it is this instinctive sense of obligation that is the chief foundation of society. Its reality takes objective shape, and displays itself in family life and in our other civic and social institutions. It is not limited to any one form, and it is capable of manifesting itself in new forms and of developing and changing old forms. Indeed the civic community is more than a political fabric. It includes all the social institutions in and by which the individual life is influenced—such as are the family, the school, the church, the legislature, and the executive. None of these can subsist in isolation from the rest: together they and other institutions of the kind form a single organic whole, the whole which is known as the Nation. The spirit and habit of life which this organic entirety inspires and compels are what, for my present purpose, I mean by "Sittlichkeit." "Sitte" is the German for custom, and "Sittlichkeit" implies custom and a habit of mind and action. It also implies a little more. Fichte[1] defines it in words which are worth quoting, and which I will put into English: "What, to begin with," he says, "does 'Sitte' signify, and in what sense do we use the word? It means for us, and means in every accurate reference we make to it, those principles of conduct which regulate people in their relations to each other, and which have become matter of habit and second nature at the stage of culture reached, and of which, therefore, we are not explicitly conscious. Principles, we call them, because we do not refer to the sort of conduct that is casual or is determined on casual grounds, but to the hidden and uniform ground of action which we assume to be present in the man whose action is not deflected and from which we can pretty certainly predict what he will do. Principles, we say, which have become a second nature and of which we are not explicitly conscious. We thus exclude all impulses and motives based on free individual choice, the inward aspect of 'Sittlichkeit,' that is to say morality, and also the outward side, or law, alike. For what a man has first to reflect over and then freely to resolve is not for him a habit in conduct; and in so far as habit in conduct

[1] *Grundzüge des gegenwärtigen Zeitalters*, Werke, Band vii. p. 214.

is associated with a particular age, it is regarded as the unconscious instrument of the Time Spirit."

The system of ethical habit in a community is of a dominating character, for the decision and influence of the whole community is embodied in that social habit. Because such conduct is systematic and covers the whole of the field of society, the individual will is closely related by it to the will and spirit of the community. And out of this relation arises the power of adequately controlling the conduct of the individual. If this power fails or becomes weak the community degenerates and may fall to pieces. Different nations excel in their "Sittlichkeit" in different fashions. The spirit of the community and its ideals may vary greatly. There may be a low level of "Sittlichkeit"; and we have the spectacle of nations which have even degenerated in this respect. It may possibly conflict with law and morality, as in the case of the duel. But when its level is high in a nation we admire the system, for we see it not only guiding a people and binding them together for national effort, but affording the most real freedom of thought and action for those who in daily life habitually act in harmony with the General Will.

The Influence of Sittlichkeit.—Thus we have in the case of a community, be it the city or be it the state, an illustration of a sanction which is sufficient to compel observance of a rule without any question of the application of force. This kind of sanction may be of a highly compelling quality, and it often extends so far as to make the individual prefer the good of the community to his own. The development of many of our social institutions, of our hospitals, of our universities, and of other establishments of the kind, shows the extent to which it reaches and is powerful. But it has yet higher forms in which it approaches very nearly to the level of the obligation of conscience, although it is distinct from that form of obligation. I will try to make clear what I mean by illustrations. A man may be impelled to action of a high order by his sense of unity with the society to which he belongs, action of which, from the civic standpoint, all approve. What he does in such a case is natural to him, and is done without thought of reward or punishment; but it has reference to standards of conduct set up by society and accepted just because society has set them up. There is a poem by the late Sir Alfred Lyall which exemplifies the high level that may be reached in such conduct. The poem is called *Theology in Extremis*, and it describes the feelings of an Englishman who had been taken prisoner by Mahometan rebels in the Indian Mutiny. He is face to face with a cruel death. They offer him his life if he will repeat something from the Koran. If he complies, no one is likely ever to hear of it, and he will be free to return to England and to the woman he loves. Moreover, and here is the real point, he is not a believer in Christianity, so that it is no question of denying his Saviour. What ought he to do? Deliverance is easy, and the relief and advantage would be unspeakably great. But he

does not really hesitate, and every shadow of doubt disappears when he hears his fellow-prisoner, a half-caste, pattering eagerly the words demanded. He himself has no hope of heaven and he loves life—

> Yet for the honour of English race
> May I not live or endure disgrace.
> Ay, but the word if I could have said it,
> I by no terrors of hell perplext.
> Hard to be silent and have no credit
> From man in this world, or reward in the next;
> None to bear witness and reckon the cost
> Of the name that is saved by the life that is lost.
> I must begone to the crowd untold
> Of men by the cause which they served unknown,
> Who moulder in myriad graves of old;
> Never a story and never a stone
> Tells of the martyrs who die like me
> Just for the pride of the old countree.

I will take another example, this time from the literature of ancient Greece. In one of the shortest but not least impressive of his *Dialogues*, the "Crito," Plato tells us of the character of Socrates, not as a philosopher, but as a good citizen. He has been unjustly condemned by the Athenians as an enemy to the good of the state. Crito comes to him in prison to persuade him to escape. He urges on him many arguments, his duty to his children included. But Socrates refuses. He chooses to follow, not what any one in the crowd might do, but the example which the ideal citizen should set. It would be a breach of his duty to fly from the judgment duly passed in the Athens to which he belongs, even though he thinks the decree should have been different. For it is the decree of the established justice of his City State. He will not "play truant." He hears the words, "Listen, Socrates, to us who have brought you up"; and in reply he refuses to go away, in these final sentences: "This is the voice which I seem to hear murmuring in my ears, like the sound of the flute in the ears of the mystic; that voice, I say, is murmuring in my ears, and prevents me from hearing any other. And I know that anything more which you may say will be vain."

Why do men of this stamp act so, it may be when leading the battle line, it may be at critical moments of quite other kinds? It is, I think, because they are more than mere individuals. Individual they are, but completely real, even as individual, only in their relation to organic and social wholes in which they are members, such as the family, the city, the state. There is in every truly organised community a Common Will which is willed by those who compose that community, and who in so willing are more than isolated men and women. It is not, indeed, as unrelated atoms that they have lived. They have grown, from the receptive days of childhood up to maturity, in an atmosphere of example and general custom,

and their lives have widened out from one little world to other and higher worlds, so that, through occupying successive stations in life, they more and more come to make their own the life of the social whole in which they move and have their being. They cannot mark off or define their own individualities without reference to the individualities of others. And so they unconsciously find themselves as in truth pulse-beats of the whole system, and themselves the whole system. It is real in them and they in it. They are real only because they are social. The notion that the individual is the highest form of reality, and that the relationship of individuals is one of mere contract, the notion of Hobbes and of Bentham and of Austin, turns out to be quite inadequate. Even of an every-day contract, that of marriage, it has been well said that it is a contract to pass out of the sphere of contract, and that it is possible only because the contracting parties are already beyond and above that sphere. As a modern writer, F. H. Bradley of Oxford, to whose investigations in these regions we owe much, has finely said:[1] "The moral organism is not a mere animal organism. In the latter the member is not aware of itself as such, while in the former it knows itself, and therefore knows the whole in itself. The narrow external function of the man is not the whole man. He has a life which we cannot see with our eyes, and there is no duty so mean that it is not the realisation of this, and knowable as such. What counts is not the visible outer work so much as the spirit in which it is done. The breadth of my life is not measured by the multitude of my pursuits, nor the space I take up amongst other men; but by the fulness of the whole life which I know as mine. It is true that less now depends on each of us as this or that man; it is not true that our individuality is therefore lessened, that therefore we have less in us."

The General Will.—There is, according to this view, a General Will with which the will of the good citizen is in accord. He feels that he would despise himself were his private will not in harmony with it. The notion of the reality of such a will is no new one. It is as old as the Greeks, for whom the moral order and the city state were closely related; and we find it in modern books in which we do not look for it. Jean Jacques Rousseau is probably best known to the world by the famous words in which he begins the first chapter of the *Social Contract*: "Man is born free, and everywhere he is in chains. Those who think themselves to be the masters of others cease not to be greater slaves than the people they govern." He goes on in the next paragraph to tell us that if he were only to consider force and the effects of it, he would say that if a nation was constrained to obey and did obey, it did well, but that whenever it could throw off its yoke and did throw it off, it acted better. His words, written in 1762, became a text for the pioneers of the French Revolution. But they would have done well to read further into the book. As Rousseau goes on we find a different

[1] *Ethical Studies*, p. 170.

conception. He passes from considering the fiction of a Social Contract to a discussion of the power over the individual of the General Will, by virtue of which a people becomes a people. This General Will, the *Volonté Générale*, he distinguishes from the *Volonté de Tous*, which is a mere numerical sum of individual wills. These particular wills do not rise above themselves. The General Will, on the other hand, represents what is greater than the individual volition of those who compose the society of which it is the will. On occasions this higher will is more apparent than at other times. But it may, if there is social slackness, be difficult to distinguish from a mere aggregate of voices, from the will of a mob. What is interesting is that Rousseau, so often associated with doctrine of quite another kind, should finally recognise the bond of a General Will as what really holds the community together. For him, as for those who have had a yet clearer grasp of the principle, in willing the General Will we not only realise our true selves but we may rise above our ordinary habit of mind. We may reach heights which we could not reach, or which at all events most of us could not reach, in isolation. There are few observers who have not been impressed with the wonderful unity and concentration of purpose which an entire nation may display—above all, in a period of crisis. We see it in time of war, when a nation is fighting for its life or for a great cause. We have seen it in Japan, and we have seen it still more recently even among the peoples of the Balkan Peninsula. We have marvelled at the illustrations with which history abounds of the General Will rising to heights of which but few of the individual citizens in whom it is embodied have ever before been conscious even in their dreams.

The Evolution of the General Will.—In his life of Themistocles Plutarch tells us how even in time of peace the leader of the Athenian people could fashion them into an undivided community and inspire them to rise above themselves. It was before the Persians had actually threatened to invade Attica that Themistocles foresaw what would come. Greece could not raise armies comparable in numbers to those of the Persian kings. But he told his people that the oracle had spoken thus: "When all things else are taken within the boundary of Cecrops and the covert of divine Cithæron, Zeus grants to Athena that the wall of wood alone shall remain uncaptured, which shall help thee and thy children." The Athenian citizens were accustomed in each year to divide among themselves the revenue of their silver mines at Laurium. Themistocles had the daring, so Plutarch tells us, to come forward and boldly propose that the usual distribution should cease, and that they should let him spend the money for them in building a hundred ships. The citizens rose to his lead, the ships were built, and with them the Greeks were able at a later date to win against Xerxes the great sea-fight at Salamis, and to defeat an invasion by the hosts of Persia which, had it succeeded, might have changed the course of modern as well as ancient history. By such leadership it is that a common ideal can be made to penetrate

the soul of a people, and to take complete possession of it. The ideal may be very high, or it may be of so ordinary a kind that we are not conscious of it without the effort of reflection. But when it is there it influences and guides daily conduct. Such idealism passes beyond the sphere of law, which provides only what is necessary for mutual protection and liberty of just action. It falls short, on the other hand, in quality of the dictates of what Kant called the Categorical Imperative that rules the private and individual conscience, but that alone, an Imperative which therefore gives insufficient guidance for ordinary and daily social life. Yet the ideal of which I speak is not the less binding; and it is recognised as so binding that the conduct of all good men conforms to it.

The Higher Nationality.—Thus we find within the single state the evidence of a sanction which is less than legal but more than merely moral, and which is sufficient, in the vast majority of the events of daily life, to secure observance of general standards of conduct without any question of resort to force. If this is so within a nation, can it be so as between nations? This brings me at once to my third point. Can nations form a group or community among themselves within which a habit of looking to common ideals may grow up sufficiently strong to develop a General Will, and to make the binding power of these ideals a reliable sanction for their obligations to each other? There is, I think, nothing in the real nature of nationality that precludes such a possibility. A famous student of history has bequeathed to us a definition of nationality which is worth attention: I refer to Ernest Renan, of whom George Meredith once said to me—while the great French critic was still living—that there was more in his head than in any other head in Europe. Renan tells us that "man is enslaved neither by his race, nor by his language, nor by his religion, nor by the course of rivers, nor by the direction of mountain ranges. A great aggregation of men, sane of mind and warm of heart, creates a moral consciousness which is called a nation." Another acute critic of life, Matthew Arnold, citing one still greater than himself, draws what is in effect a deduction from the same proposition. "Let us," he says,[1] "conceive of the whole group of civilised nations as being, for intellectual and spiritual purposes, one great confederation, bound to a joint action and working towards a common result; a confederation whose members have a due knowledge both of the past, out of which they all proceed, and of each other. This was the ideal of Goethe, and it is an ideal which will impose itself upon the thoughts of our modern societies more and more." But while I admire the faith of Renan and Arnold and Goethe in what they all three believed to be the future of humanity, there is a long road yet to be travelled before what they hoped for can be fully accomplished. Grotius concludes his great book on War and Peace with a noble prayer: "May God write," he said, "these lessons—He Who alone can—on the hearts of all those who have the affairs of Christendom in their hands. And may He give to those persons

[1] Preface to the *Poems of Wordsworth.*

a mind fitted to understand and to respect rights, human and divine, and lead them to recollect always that the ministration committed to them is no less than this, that they are the Governors of Man, a creature most dear to God." The prayer of Grotius has not yet been fulfilled, nor do recent events point to the fulfilment as being near. The world is probably a long way off from the abolition of armaments and the peril of war. For habits of mind which can be sufficiently strong with a single people can hardly be as strong between nations. There does not exist the same extent of common interest, of common purpose, and of common tradition. And yet the tendency, even as between nations that stand in no special relation to each other, to develop such a habit of mind is in our time becoming recognisable. There are signs that the best people in the best nations are ceasing to wish to live in a world of mere claims, and to proclaim on every occasion "Our country, right or wrong." There is growing up a disposition to believe that it is good, not only for all men but for all nations, to consider their neighbours' point of view as well as their own. There is apparent at least a tendency to seek for a higher standard of ideals in international relations. The barbarism which once looked to conquest and the waging of successful war as the main object of statesmanship, seems as though it were passing away. There have been established rules of International Law which already govern the conduct of war itself, and are generally observed as binding by all civilised people, with the result that the cruelties of war have been lessened. If practice falls short of theory, at least there is to-day little effective challenge of the broad principle that a nation has as regards its neighbours duties as well as rights. It is this spirit that may develop as time goes on into a full international "Sittlichkeit." But such development is certainly still easier and more hopeful in the case of nations with some special relation, than it is within a mere aggregate of nations. At times a common interest among nations with special relations of the kind I am thinking of gives birth to a social habit of thought and action which in the end crystallises into a treaty—a treaty which in its turn stimulates the process that gave it birth. We see this in the case of Germany and Austria, and in that of France and Russia. Sometimes a friendly relationship grows up without crystallising into a general treaty. Such has been the case between my own country and France. We have no Convention excepting one confined to the settlement of old controversies over specific subjects, a Convention which has nothing to do with war. None the less, since in that Convention there was embodied the testimony of willingness to give as well as to take, and to be mutually understanding and helpful, there has arisen between France and England a new kind of feeling which forms a real tie. It is still young, and it may stand still or diminish; but equally well it may advance and grow, and it is earnestly to be hoped that it will do so.

International General Will.—Recent events in Europe and the way in which the Great Powers have worked together to preserve the peace of Europe, as if forming one community, point to the ethical possibilities of

the group system as deserving of close study by both statesmen and students. The "Sittlichkeit" which can develop itself between the peoples of even a loosely connected group seems to promise a sanction for International Obligation which has not hitherto, so far as I know, attracted attention in connection with International Law. But if the group system deserves attention in the cases referred to, how much more does it call for attention in another and far more striking case!

In the year which is approaching, a century will have passed since the United States and the people of Canada and Great Britain terminated a great war by the Peace of Ghent. On both sides the combatants felt that war to be unnatural and one that should never have commenced. And now we have lived for nearly a hundred years, not only in peace, but also, I think, in process of coming to a deepening and yet more complete understanding of each other, and to the possession of common ends and ideals—ends and ideals which are natural to the Anglo-Saxon group, and to that group alone. It seems to me that within our community there is growing an ethical feeling which has something approaching to the binding quality of which I have been speaking. Men may violate the obligations which that feeling suggests, but by a vast number of our respective citizens it would not be accounted decent to do so. For the nations in such a group as ours to violate these obligations would be as if respectable neighbours should fall to blows because of a difference of opinion. We may disagree on specific points, and we probably shall, but the differences should be settled in the spirit and in the manner in which citizens usually settle their differences. The new attitude which is growing up has changed many things, and made much that once happened no longer likely to recur. I am concerned when I come across things that were written about America by British novelists only fifty years ago, and I doubt not that there are some things in the American literature of days gone past which many here would wish to have been without. But now that sort of writing is happily over, and we are realising more and more the significance of our joint tradition and of the common interests which are ours. It is a splendid example to the world that Canada and the United States should have nearly four thousand miles of frontier practically unfortified. As an ex-War Minister, who knows what a saving in unproductive expenditure this means, I fervently hope that it may never be otherwise. But it is not merely in external results that the pursuit of a growing common ideal shows itself when such an ideal is really in men's minds. It transforms the spirit in which we regard each other, and it gives us faith in each other—

> Why, what but faith, do we abhor
> And idolise each other for—
> Faith in our evil or our good,
> Which is or is not understood
> Aright by those we love or those
> We hate, thence called our friends or foes.

The Contribution of Lawyers.—I think that for the future of the relations between the United States on the one hand and Canada and Great Britain on the other, those who are assembled in this great meeting have their own special responsibility. We who are the lawyers of the New World and of the old mother country possess, as I have said to you, a tradition which is distinctive and peculiarly our own. We have been taught to look on our system of justice, not as something that waits to be embodied in abstract codes before it can be said to exist, but as what we ourselves are progressively and co-operatively evolving. And our power of influence is not confined to the securing of municipal justice. We play a large part in public affairs, and we influence our fellow-men in questions which go far beyond the province of the law, and which extend in the relations of society to that "Sittlichkeit" of which I have spoken. In this region we exert much control. If, then, there is to grow up among the nations of our group, and between that group and the rest of civilisation, a yet further development of "Sittlichkeit," has not our profession special opportunities of influencing opinion, which are coupled with a deep responsibility? To me, when I look to the history of our calling in the three countries, it seems that the answer to this question requires no argument and admits of no controversy. It is our very habit of regarding the law and the wider rules of conduct which lie beyond the law as something to be moulded afresh as society develops, and to be moulded best if we co-operate steadily, that gives us an influence perhaps greater than is strictly ours, an influence which may in affairs of the state be potently exercised for good or for evil. This, then, is why, as a lawyer speaking to lawyers, I have a strong sense of responsibility in being present here to-day, and why I believe that many of you share my feeling. A movement is in progress which we, by the character of our calling as judges and as advocates, have special opportunities to further. The sphere of our action has its limits, but at least it is given to us as a body to be the counsellors of our fellow-citizens in public and in private life alike. I have before my mind the words which I have already quoted of the present President of the United States, when he spoke of "lawyers who can think in the terms of society itself." And I believe that if, in the language of yet another President, in the famous words of Lincoln, we as a body in our minds and hearts "highly resolve" to work for the general recognition by society of the binding character of international duties and rights as they arise within the Anglo-Saxon group, we shall not resolve in vain. A mere common desire may seem an intangible instrument, and yet, intangible as it is, it may be enough to form the beginning of what in the end will make the whole difference. Ideas have hands and feet, and the ideas of a Congress such as this may affect public opinion deeply. It is easy to fail to realise how much an occasion like the assemblage in Montreal of the American Bar Association, on the eve of a great international centenary, can be made to mean, and it is easy to let such an occasion pass with

a too timid modesty. Should we let it pass now, I think a real opportunity for doing good will just thereby have been missed by you and me. We need say nothing; we need pass no cut and dried resolution. It is the spirit and not the letter that is the one thing needful.

I do not apologise for having trespassed on the time and attention of this remarkable meeting for so long, or for urging what may seem to belong more to ethics than to law. We are bound to search after fresh principles if we desire to find firm foundations for a progressive practical life. It is the absence of a clear conception of principle that occasions some at least of the obscurities and perplexities that beset us in the giving of counsel and in following it. On the other hand, it is futile to delay action until reflection has cleared up all our difficulties. If we would learn to swim, we must first enter the water. We must not refuse to begin our journey until the whole of the road we may have to travel lies mapped out before us. A great thinker declared that it is not Philosophy which first gives us the truth that lies to hand around us, and that mankind has not to wait for Philosophy in order to be conscious of this truth. Plain John Locke put the same thing in more homely words when he said that "God has not been so sparing to men to make them two-legged creatures, and left it to Aristotle to make them rational." Yet the reflective spirit does help, not by furnishing us with dogmas or final conclusions, or even with lines of action that are always definite, but by the insight which it gives, an insight that develops in us what Plato called the "synoptic mind," the mind that enables us to see things steadily as well as to see them whole. And now I have expressed what I had in my mind. Your welcome to me has been indeed a generous one, and I shall carry the memory of it back over the Atlantic. But the occasion has seemed to me significant of something beyond even its splendid hospitality. I have interpreted it, and I think not wrongly, as the symbol of a desire that extends beyond the limits of this assemblage. I mean the desire that we should steadily direct our thoughts to how we can draw into closest harmony the nations of a race in which all of us have a common pride. If that be now a far-spread inclination, then indeed may the people of three great countries say to Jerusalem, "Thou shalt be built," and to the Temple, "Thy foundation shall be laid."

THE COMMONWEALTH REFERENDA.

[*Contributed by* A. Berriedale Keith, Esq., D.C.L.]

The Proposed Amendments.—The amendments of the Federal Constitution which were passed by the Parliament of the Commonwealth at the end of the session of 1912, and submitted to the electors by referenda on May 31, 1913, were six in number.

The first proposed law, the Constitution Alteration (Trade and Commerce), 1912, proposed to alter s. 51 (1) of the Constitution of the Commonwealth, which empowers the Parliament to make laws for the peace, order, and good government of the Commonwealth with respect to "trade and commerce with other countries and among the States," by deleting the restriction to trade and commerce "with other countries and among the States," and giving general power to legislate with regard to trade and commerce, "but not including trade and commerce upon railways the property of a State, except so far as it is trade and commerce with other countries or among the States."

The second proposed law, the Constitution Alteration (Corporations), 1912, substituted for s. 51 (20) of the Constitution, which gave power to legislate regarding foreign corporations and trading or financial corporations formed within the limits of the Commonwealth, general power to deal with corporations, including:

(*a*) The creation, dissolution, regulation, and control of corporations;

(*b*) Corporations formed under the law of a State, including their dissolution, regulation, and control; but not including municipal or governmental corporations or any corporation formed solely for religious, charitable, scientific or artistic purposes, and not for the acquisition of gain by the corporation or its members;

(*c*) Foreign corporations, including their regulation and control.

The third proposed law, the Constitution Alteration (Industrial Matters), 1912, proposed to substitute for s. 51 (35), empowering Parliament to legislate for conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State, power to legislate for labour and employment and unemployment, including:

(*a*) The terms and conditions of labour and employment in any trade, industry, occupation, or calling; (*b*) The rights and obligations of employers

and employees; (*c*) Strikes and lock-outs; (*d*) The maintenance of industrial peace; and (*e*) The settlement of industrial disputes.

The fourth proposed law, the Constitution Alteration (Railway Disputes), 1912, proposed to add power to deal with conciliation and arbitration for the prevention and settlement of industrial disputes in relation to employment in the railway service of a State.

The fifth proposed law, the Constitution Alteration (Trusts), 1912, proposed to give power to legislate with regard to trusts, combinations, and monopolies in relation to production, manufacture, or supply of goods or the supply of services.

The sixth proposed law, the Constitution Alteration (Nationalisation of Monopolies), 1912, proposed to provide that "when each House of Parliament in the same session has, by resolution passed by an absolute majority of its members, declared that the industry or business of producing, manufacturing, or supplying any specified services is the subject of a monopoly, the Parliament shall have power to make laws for the carrying on of the industry or business by or under the control of the Commonwealth, and acquiring for that purpose on just terms any property used in connection with the industry or business." It was added that "this section shall not apply to any industry or business conducted or carried on by the Government of a State or any public authority constituted under a State."

The referenda differed from those submitted in 1911, inasmuch as six proposed laws were put forward in place of two, the first of which included the subject-matter of the first five of those submitted in 1913. The difference between the two sets of laws consisted in concessions made in favour of the States. Thus trade and commerce upon the State railways were definitely excluded; municipal and governmental corporations were not made subject to the control of the Commonwealth, and the power to nationalise monopolies was not to apply to any industry or business conducted or carried on by the Government of a State or any public authority constituted under a State.

The Discussion in Parliament.—In moving the second reading[1] of the proposed Bill to amend the Commonwealth Constitution to give power to the Commonwealth Parliament with regard to corporations, the Attorney-General of the Commonwealth instanced certain cases to show that the existing power to legislate for the control of corporations was wholly inadequate. He laid stress on the fact that great difficulty had been experienced in obtaining information; witness after witness called before various Commissions had declined to give information; that was a very significant and sinister feature, for it might be taken for granted that men did not withhold things of no value. He had, therefore, been compelled to go for his facts to those established by judicial inquiry or gathered with difficulty from inquiries by Royal Commissions.

[1] Commonwealth *Parliamentary Debates*, 1912, p. 5625 *seq.*

In the first place he dealt with the Act passed by Parliament to deal with trusts and combines, under which there had been one main prosecution directed against companies engaged in the coal trade in Newcastle, and companies engaged in inter-State shipping. The Coal Vend in Newcastle controlled over 90 per cent. of the trade, and the shipping combine over 90 per cent. of the shipping. The persons who controlled 90 per cent. of the trade agreed with those who controlled 90 per cent. of the carriage that the former should not sell to any but the shipping combine, and the shipping combine should carry no coal except that of the Vend. The people in Victoria, South Australia, and Queensland were almost wholly dependent upon the Newcastle coal for industrial and domestic supplies. The result of the agreement was that coal was raised in price from 14*s.* a ton in 1905 to 24*s.* a ton in 1907. Two companies which attempted to defy the combine went into liquidation. State Governments fared as badly as the general public; the Victorian railways in 1910 took 120,000 tons, and paid 48 per cent. over the price of 1906; the Melbourne City Council paid 50 per cent. and the South Australian railways 44 per cent. over the price ruling in that year. The freight was raised from 3*s.* 10*d.* to 8*s.* 6*d.* a ton, and it was admitted that, when the South Australian Government attempted to start a coal mine of its own, the Vend took measures to prevent its doing so by influencing the Legislative Council to reject the measure. In short, a virtual monopoly existed with regard to two of the essentials of modern civilised life —coal and transport. Nevertheless, the High Court had held that the operations of the combine were not illegal, and thus showed that there could lawfully exist combines which could levy toll upon the whole community.

In the case of sugar, the Colonial Sugar Refining Company controlled the trade and fixed the price of sugar all over the Commonwealth, only one other company had a share in the trade, and that company had only 8 per cent. of the total. It was difficult to know the facts, for the Company had refused to give evidence before the Royal Commission except in its own way, had denied the right of the Commission to ask questions, and had obtained from the High Court an injunction restraining the Commission from asking a large variety of questions. The Company had inner reserves of accumulated profits of three millions with a nominal capital of the same sum, of which £675,000 were capitalised profits, and it had businesses in Fiji and New Zealand—in the former using coloured labour. It paid a steady 10 per cent. dividend, and a bonus making in all 12½ per cent. in some years. On the other hand the average price of sugar in 1911 to the consumer was £21 17*s.* 6*d.* in Australia, being £7 7*s.* 2*d.* more than the average net price at Auckland, although the company made a profit on the New Zealand and Fiji business of £115,000. On the other hand the company had insisted in its agreements that its rate of profit must be maintained, and that the cane-grower must bear the burden of any increase in the wages of the employees as a result of determinations of Wages Boards

or Arbitration Courts. It had been alleged, and not denied in evidence, that the Colonial Sugar Refining Company had paid £50,000 into the fund raised in 1911 to defeat the propositions then submitted to the electorate of the Commonwealth in favour of giving the Parliament power to deal with trusts, monopolies, and the control of trade.

In the third place the Government had recently made an effort to obtain steel rails for the construction of the transcontinental railway. It called for tenders all over the world and received only unsatisfactory offers. Inquiries in Europe and America had shown that, owing to an agreement entered into by all the principal rail manufacturers of the world to refrain from real competition with one another, and so to frame tenders as practically to allot orders to whichever firm they pleased, no firm of agents could obtain delivery of rails for the Commonwealth except at the trust's price. Efforts to obtain delivery at European or American ports had failed, and eventually the Government had to accept an offer for steel rails at £7 7*s.* 6*d.* a ton, being an increase of 5*s.* on the amount of the original tenders, and had the Government delayed longer they would doubtless have had to pay even more. The Commonwealth Government was as helpless as the poorest citizen of Australia when it went into the market to buy rails for the transcontinental railway. The Steel Trust was no respecter of persons, and treated the Government no better than it treated individual citizens.

Mr. Hughes further urged as a reason for extending the powers of the Commonwealth the total inability of the Commonwealth to secure that the consumer should pay reasonable prices and the employees should receive reasonable wages in cases in which the manufacturers were granted protection by Parliament. The Commonwealth had the right, which it had exercised, to protect manufacturers from competition, but it could not properly continue to exercise that right without acquiring the power to prevent combinations of manufacturers fixing prices at unreasonable figures as against the consumer or appropriating for themselves the full advantage of the protection granted.

The Opposition in the Commonwealth House of Representatives resisted the proposals on similar grounds to those which had been urged in opposition to the similar proposals made in 1910. Mr. Deakin[1] laid emphasis on the fact that the ends which the Government set themselves to accomplish could be effectively carried out by the co-operation of the States and the Commonwealth, and that it was not therefore necessary that the Commonwealth should be granted more extended powers than it already possessed. Sir John Forrest[2] urged in addition that no fresh facts had arisen to justify a reversal of the decision come to by the people of the Commonwealth in 1911; that the effect of the proposals would be to invade the fundamental principles of the Constitution, and would be contrary to the

[1] Commonwealth *Parliamentary Debates*, 1912, pp. 5616, 6507, 6364 *seq.*

[2] *Ibid.* pp. 5919 *seq.*

express conditions under which the federation was established. He also argued that undue centralisation was opposed to progress, while the local management of local affairs stimulated the interest of the people in the conduct of public business, that the Federal Parliament would be overburdened if it attempted to deal with local and domestic business, and that the passage of necessary Federal legislation would be delayed and hampered.

The Arguments for the Referenda.—In accordance with an Act passed in the session of 1912 the arguments for and against the referenda were prepared by representatives of the Government and Opposition, and circulated to every elector. The argument in favour of the first of the proposed laws was that the amendment was vitally necessary as the trade and commerce power was the keystone of the powers of the Federal Parliament, and that the existing limitation paralysed the action of Parliament in almost every direction. Without the amendment effective legislation with respect to trusts, combines, and monopolies would be, even if the other amendments were carried, almost impossible. The existing division of the trade and commerce power between Federation and States was artificial, indefinite, illogical, and mischievous. It did not correspond with any distinction in the world of affairs; no one could tell what it meant owing to a tangle of judicial decisions, and no one knew where inter-State commerce began and where it ended. The man who wanted to obey the law did not know what law to obey, the man who did not want to obey the law was helped to dodge from one jurisdiction to another. All federations except America had this power, and in America the Federal trade and commerce power was hopelessly unable to cope with the manifold ingenuity of the great trusts.

The second law was needed to prevent a repetition of the decision of the High Court that the Parliament had no power to pass a general Company Law although it had been believed, when the Constitution was before the people in 1899 and for long afterwards, that this power existed. Laws dealing with trusts and combines must prove quite ineffective unless there was power to deal with companies. To order a trust to dissolve, and to be unable to deal with the individuals or companies who formed it, was simply farcical.

The third proposed law dealt with matters of first importance, the world-wide problem of industrial unrest. High prices and low wages were the immediate dominant factors, and the Government must aim at removing, as far as possible, the causes of industrial unrest and at providing means for the settlement of industrial disputes. Parliament had not been given a general power, and the limited power as to conciliation and arbitration had been reduced to a mere shadow by the judgments of the High Court. Under these judgments the Court of Industrial Conciliation and Arbitration could not make an award a common rule in any industry. Again, the Court could not prevent disputes but must wait until a dispute arose and had spread from one State to another. Even as it was, the Court had done excellent

work: in not one single case had an award of the Court been broken, but its power must be increased. It must have the power to prevent disputes arising and spreading, it must be able to deal with the conditions that caused disputes, and it must have the power to make a common rule. No interference with the State Courts was desired; the proposal was to deal with those disputes which the State laws could not or did not settle. Local conditions would certainly be considered by the Court, and as one Court could not deal with all the different industrial conditions of Australia, local and district tribunals could be appointed to deal with industrial troubles with which the State Courts could not and did not deal.

The fourth proposed law gave only power to deal with industrial disputes on State railways or tramways through Conciliation and Arbitration Courts. Unlike the proposal of 1911, it was not sought to give power to the Parliament to make laws relating to industrial matters generally with respect to State railways, to regulate fares and freights, to interfere in the management, or to take the railways over. Any industrial strife on the railways would seriously threaten Australian commerce; the wages and conditions were already settled in several States by Arbitration Courts and Wages Boards, and a Federal Court would only supplement and not exclude the jurisdiction in those cases where jurisdiction already existed, while in the other cases it would provide a means of preserving industrial peace.

The fifth proposed law gave power to deal with trusts. Trusts were the real rulers of the world, and fixed the prices and charged what they pleased; daily their power was growing greater. If land and the instruments of production were monopolised by combines of great capitalists, men were reduced to being, to all intents and purposes, economic slaves. The Americans were not only in economic, but in political and social servitude. The cost of living had increased faster in America because the American trusts were the stronger. Three years ago there were thirty-three combines in Australia, of whom some were very powerful organisations, including the sugar monopoly, the shipping combine, which, in conjunction with the Newcastle Coal Vend, had raised the price of coal from 14*s.* to 24*s.* a ton. The American Beef Trust had actually commenced operations in Australia, but the American anti-Trust Law had failed to repress trusts; the Standard Oil Trust had been dissolved by the Federal Supreme Court of America, but its power was now greater than ever. Similarly the Commonwealth was helpless, and Mr. Glynn,[1] Attorney-General in the Deakin Government, and Mr. Irvine in 1910, had recognised that an increase of the powers of the Commonwealth was necessary and that the States could not deal successfully with the matter.

The sixth proposed law for the nationalisation of monopolies was so worded that the power could not be exercised in respect of ordinary private business, and in any case a just price must be paid. Only Parliament could decide what was a monopoly; the Federal Parliament was the servant of the

[1] Commonwealth Parliamentary Paper, No. 51 of 1910.

people, and it would act, no doubt, through a Commission of Inquiry. It was not Socialism to nationalise monopolies, for where there was a monopoly there could not be any effective competition.

It was further pointed out that Mr. Groom, when Attorney-General, Mr. W. H. Irvine in 1910, Mr. Deakin, and Mr. Glynn had all, at one time or other, recognised that some alteration of the Constitution to increase the Federal powers was necessary. No one had doubted until the decisions of the High Court that the Parliament could legislate with regard to workers, trade marks or companies, or as to payment of compensation to all seamen. The doctrine of limitations of the powers given to the Commonwealth which has been applied by the High Court could only be met by specific alterations. The Commonwealth Parliament would no more abuse its powers than the State Parliaments actually abused them.

The Question of Unification.—It had been argued that unification would result, but the Labour Party did not favour unification. The proposed amendments would not lead to unification. The State Parliaments would remain, their laws would not be subject to the approval of the Federal Parliament; the State Governors would remain; the amendments were strictly federal in their nature, and absolutely necessary if federation was to be anything but a sham. The States' rights were nothing apart from the rights of the people who lived in the States, and these people were the electors of the Commonwealth as much as of the State Parliaments. Even if the amendments were passed the powers which the States would have would still be much wider and more important than those of the Commonwealth, including land and settlement, agriculture, etc.; development and protection of natural resources—roads, forests, fisheries, game, mines, water conservation and irrigation, etc.; education—primary, secondary, and higher; public health and morals; social relations; manufacture, except as to combinations and monopolies; industrial law generally, except as regards labour and employment; criminal law generally; civil law generally—contracts, torts, real and personal property, inheritance, etc.; liquor and licensing; State constitution and government; municipal and local government; State railways (except arbitration on industrial disputes); State works and undertakings; State monopolies; State taxation; State insurance within the State; State banking within the State; State public service; administration of justice and legal procedure; police; and inter-State commerce on State railways. Moreover, they would have power to legislate so far as the point was not covered by Federal laws with regard to trade and commerce; corporations, labour and employment, and combines and monopolies. Canada had always had the powers asked for by the Commonwealth, had definitely rejected the American Constitution, and had used her great powers for a national purpose and in a national spirit.

The Arguments against the Referenda.—The arguments against the amendments put forward by the Opposition in the Commonwealth Parlia-

ment commence by a reference to the fact that the proposals of the Government had been rejected in April 1911 by stupendous majorities. The proposals embodied a vital and far-reaching alteration of the Constitution accepted twelve years ago. The people of Australia had then decided that while matters of national concern and national extent should be transferred to the central government, the States should remain the repositories of power in all matters of local concern. Retention of local autonomy was necessary to avoid the evils and neglects of centralisation, but the people had, as shown by the testimony of Professor Dicey and of the Right Hon. James Bryce, conferred wide powers on the national Parliament. The powers now sought for the Commonwealth Parliament were excessive and unnecessary. The result, according to Mr. Mitchell, K.C., would be to create a kind of mongrel constitution between the two systems which would be impracticable in working. The transfer to the Federation of the powers proposed would mean a long stride in the direction of unification.

Against the proposed law No. 1 it was argued that national trade and commerce was already within the control of the Commonwealth, and that the only trade and commerce reserved was that within the States themselves. The States would thus be made dependent on the Commonwealth, and their legislation could only fill up any point overlooked by the Commonwealth. This would lead to costly investigations in the Law Courts as to the limits of State jurisdiction. Every division of the trade and commerce power must be more or less arbitrary in any federation, but the Federal Constitution had already defined the clearest dividing line possible by giving to the Commonwealth the control of all federal, imperial, and foreign trade and commerce. Moreover, the policy of Australia was now dictated by the Labour caucus, and the result of the acceptance by the people of the project would leave the way open for the still wider and more costly scheme for nationalisation of all the means of production, distribution, and exchange.

As regards the second proposed law, stress was laid on the fact that it was not proposed that the Commonwealth should control even the largest firms, thus creating an artificial line between the same businesses as conducted by corporations and by firms and individuals. Mr. Justice Higgins had pointed out in the Huddart Parker case [1] that if the power to control the operations of companies was given under the Constitution, the results were certainly extraordinarily big with confusion. The Federal Parliament could thus lay down a code of law on any subject—*e.g.* libels or licensing applicable to companies alone, leaving the State Parliament to deal with the same matters as applied to individuals. The Liberals admitted that the present law affecting corporations was unsatisfactory, and had offered support to an amendment of the Constitution placing the creation and dissolution of companies under the control of the Federal Parliament, but leaving them to carry on their various trading operations under the same State laws as applied to their competitors.

[1] *Huddart Parker & Co. Proprietary Ltd.* v. *Moorehead*, 8 C.L.R. 330, at pp. 409, 410.

Against the third proposed law, it was urged that no department of the legislative power was more essentially a matter of local concern than that determining the conditions of employment in local industries. The Federal Court of Conciliation and Arbitration was apparently becoming a generating centre of industrial unrest, and threatened to become the source of artificial inter-State disputes. In order to bring cases before it, workers in unconnected industries had been induced to create inter-State disputes, and the High Court had, in several cases, held that the so-called disputes dealt with by the Court were not disputes at all in the sense meant by the Constitution, with the result that the judges had been subjected to indignity and misrepresentation. The power proposed to be given would prevent the State Parliaments from regulating labour and employment, rates of wages, hours of labour, the regulation of holidays, and so forth, and it would permit the Federal Parliament to determine rates of pay and conditions of labour throughout Australia without the intervention of any method of conciliation and arbitration or wages boards. The States should be left to deal with the matter in accordance with local requirements, local opinion, sentiment, and custom. To give the proposed power to the Commonwealth would cause the national Parliament of Australia to be the arena of perpetual industrial struggles, and prevent it from performing with proper attention the national duties which were its proper function.

As regards the fourth proposed law, it was pointed out that in 1910 the Government referenda proposals had not included the intention to deal with industrial disputes in regard to employment in the railway service of a State. This omission was, however, protested against by the Amalgamated Railway Servants' Association, and a new railway proposal was brought down on October 27, 1910, but with the other proposals was rejected by the people. The proposal to allow the Commonwealth to fix wages, hours of labour, and conditions of employment on railways, while the States should be left with the responsibility of management and finance, was open to the gravest objections. The effect on railway management would be most serious, and a breaking strain would be placed on State finance, landing the Commonwealth with the ultimate responsibility of carrying on and financing the railways. Mr. McGowen, head of the Labour Ministry of New South Wales, and formerly a railway man himself, had pointed out, when the referendum was formerly before the country, that the result might be, in the case of some of the States, that the rates of wages would be levelled down, and not increased, so that the result would not really be beneficial in all cases to railway employees themselves.

As against the fifth proposed law, it was pointed out that Liberalism held it imperative that the trusts should be controlled and regulated so as to prevent exploitation of the public, and that the Liberal party were prepared to secure for the Commonwealth in 1910 power to deal with combines and monopolies in restraint of trade, commerce, or manufactures, thus dis-

tinguishing between combinations acting in restraint of trade and those which conducted their operations without injury to the public. Already the States possessed power to deal with trusts operating within a State, and the Commonwealth had power to deal with trusts and combines operating beyond the limits of a single State. The Government of the Commonwealth had made no use of the power which it possessed. It was not true, as had been argued, that the Government had tried the law in the Coal Vend case and had found it useless, for the result of that case depended upon the fact that, on the evidence, the Crown had failed to prove intent to injure the public. A fair trial of the anti-trust legislation, including the Act of 1910 passed by the Labour Government, should be given, and the failure of the Government to give that trial could only be explained by the fact that they feared that the law would prove adequate, and thus disclose the wantonness of the demand for an enlargement of the Constitution.

The sixth proposed law was a simple proposition to empower the Federal Parliament to take over or start as a Government concern any business it likes. In this form it was rejected in 1911, and it was impossible to believe that the people in a few short months had changed the judgment they then recorded against the proposal. If adopted, the proposal would pave the way for the introduction of that Socialism which was the admitted and proclaimed objective of the Labour Party. There was no provision for discriminating between beneficial industries and industries conducted to the public injury, and many prominent labour leaders had themselves praised the Coal Vend. Nationalisation had been denounced by the Royal Commission set up by the Labour Party in the case of the sugar industry, and nationalisation was not regarded as entirely satisfactory in any of the States. Australia needed that individual and co-operative effort which history revealed as the great compelling force of progressive civilisation.

Finally it was argued that if the referenda were accepted, the Federal Government could become master of all the businesses in Australia, and employ every person connected with them on terms fixed by its Parliament. The result would be that everybody would be ultimately a public servant, dependent upon the Government, which would be at the head of a universal public service. The project of the Government was to treat the whole of Australia in the same fashion and on the same principles as were disastrously employed in the socialistic settlement in Paraguay.

Recent Decisions of the High Court as to the Constitution.—The arguments of the government in favour of the referenda laid stress on the effect of two decisions of great importance regarding the powers of the Commonwealth which were given during the year in the High Court of the Commonwealth.

The first[1] of the cases was that of the appeal of the Adelaide Steamship and three other Steamship Companies against the decision of Mr. Justice

[1] *Adelaide Steamship Co. Ltd.* v. *The King and the Attorney-General of the Commonwealth*, 15 C.L.R. 65.

Isaacs,[1] who had imposed a fine upon the shipping companies in respect of their conviction of offences against the provisions of ss. 4 and 7 of the Australian Industries Preservation Act, 1906. These sections provided that any person who either as principal or as agent made or entered into any contract or was or continued to be a principal of or engaged in any combination in relation to trade or commerce with other countries or any of the States with intent to restrain trade or commerce to the detriment of the public was guilty of an offence, and that any person who monopolised or attempted to monopolise or combined or conspired with any other person to monopolise any part of the trade or commerce with other countries or in the States with intent to control to the detriment of the public the supply of any service was guilty of an offence.

It was contended by counsel for the respondent, the Attorney-General for the Commonwealth, that all agreements in restraint of trade and commerce and of contracts or combinations to bring about a monopoly were in the eye of the common law injurious to the public, so that the mere fact of restraint or monopoly established the fact of detriment, and consequently a mere intent to restrain trade or to bring about monopoly established the intention to cause detriment.

The Chief Justice,[2] who delivered the judgment of the Court, pointed out that at one time in English law the doctrine had prevailed that every agreement under which a man undertook to limit his opportunities of competition was unlawful, not in the sense of being criminal, but in the sense of not being enforcible by law, but in later times great modifications had been introduced into the doctrine, and the rule now was that the validity of an agreement in restraint of trade depended upon the consideration of actual public interest, including not only freedom of trade, but freedom to make contracts, and the duty to perform contracts when made, and any advantages to the public which could be set off against any injury which would *prima facie* be caused by the restrictive stipulation. The Court found that as a matter of fact the agreement between the coalowners at Newcastle was a reasonable agreement to prevent excessive competition and the resulting unremunerative prices for coal. The further agreement between the Coal Vend and the shipowners was an agreement entered into with a view to the mutual interest of the coalowners and the shipowners, who were also the principal coal merchants. There was no evidence that the intention of the agreement was to effect the detriment of the public, for there was no necessary detriment to the public for one set of producers to agree to sell to others on the understanding that the vendees would not purchase from any other source. Nor could any intention to cause detriment be derived from the acts of the defendants consequent upon the agreement with the Coal Vend. The fact that the price of coal had been increased was no proof that the increase was unreasonable, and the Court found as a fact that the prices fixed in 1907 and 1908 (10*s*. and 11*s*. a ton

[1] 14 C.L.R. 387. [2] 15 C.L.R 65, at pp. 72-103.

respectively) were not only not shown to have been unreasonable rates, but were shown to have been reasonable, and no inference of intent to cause public detriment could therefore be drawn. Nor could the Court find any basis for holding that the prices at which the coal was sold by the shipowners as coal merchants were unreasonable, for the wages of sea-faring men and their conditions had been progressively improved. The Court decided therefore that upon the evidence the Crown had failed to prove any intention on the part of the appellants to cause any detriment to the public and that the case as regards penalties was therefore disposed of. As regards the application for an injunction, the Crown had failed to prove any actual detriment to the public, and they accordingly allowed the appeal with costs. An appeal from this decision was rejected by the Judicial Committee of the Privy Council on July 25, 1913.

The second case was that of the validity and the effect of the Commonwealth Royal Commissions Act of 1912.

The Commonwealth Government had set up in 1911 a Royal Commission to inquire into the sugar industry in the Commonwealth. Mr. Edward Knox, Chief Manager of the Colonial Sugar Refining Company, and the other directors of the company declined to give evidence before the Commission, and an information was accordingly laid by the Secretary of the Royal Commission against Sir H. Normand Maclaurin in June 1912. After a hearing extending for thirty-eight days, the magistrate before whom the case was brought convicted Sir Normand Maclaurin, holding that the Royal Commission was a lawful one, and that the defendant was legally bound to attend the Commission if summoned.[1] The Commonwealth Parliament proceeded to pass an Act, No. 4 of 1912, which, without affecting past proceedings, gave more extensive powers to Royal Commissions to compel the appearance of witnesses and the production of documents. After the passing of this Act a summons was served by the Royal Commission on Mr. Knox requiring him to attend before it and to produce certain books and documents. An action[2] was immediately brought on behalf of Mr. Knox claiming a declaration that the Royal Commissions Act was invalid, and in the second place an injunction to restrain the Commission from proceeding on the summons, or alternatively if the Court should decide that the Act was not invalid, a declaration that Mr. Knox was not bound to answer questions or produce books or documents relating to matters as to which the Federal Parliament had no legislative powers or which were not relevant to the subject-matter of the Commission. Stress was laid by the plaintiff on the English case of *Dyson* v. *The Attorney-General*,[3] in which a declaration was granted in a matter arising out of Form IV. under the Imperial Revenue Act of 1909-1910. The case was heard before

[1] See *Sydney Morning Herald*, Aug. 2, 1913.

[2] 18 Argus L.R. 429. See also W. Harrison Moore, "Executive Commissions of Inquiry," *Columbia Law Review*, xiii. at p. 522.

[3] [1911] 1 K.B. 410; [1912] 1 Ch. 158.

four Justices, and the Court held that the Act as a whole was valid. The Chief Justice held that the power given by the Act must be understood to be a power to inquire into any matter falling within the ambit of Federal power, and that therefore the Act itself could not be held to be invalid. But he considered that many of the questions which it was proposed to ask were not relevant to the powers of the Commonwealth. The Federal power did not extend to interference with the internal or domestic management of the affairs of a corporation trading under State laws. Nor was an inquisition into the operations of the company outside the Commonwealth within the area of Federal power, except in so far as it related to the conditions of carrying on the sugar industry in the abstract. He considered, therefore, that an injunction should be granted to restrain the Commissioners from requiring Mr. Knox to answer any questions or produce any documents which were relevant only to the internal management of the affairs of the company; the operations of the plaintiffs outside the Commonwealth except in so far as they related to the conditions of carrying on the sugar industry, irrespective of the persons by whom it was carried on; matters relating to the value of particular parts of the property of the plaintiff company, except such parts as were actually employed in the manufacture and production of sugar within the Commonwealth; and details of salaries paid to officers of the plaintiff company, except in so far as they were relevant to the actual cost of such manufacture and productions.

Barton J. concurred in the views expressed by the Chief Justice. On the other hand, Isaacs J. not only considered that the Act was valid, but that there was no ground for issuing an injunction to the Commissioners. Higgins J. considered that, as the Court had full discretion to make a declaration or not, the application should be refused. It was quite impossible to say what question could or could not properly be asked. Judgment was entered for the plaintiff in accordance with the judgment of the Chief Justice.

On the other hand, in two cases at least of importance the powers of the Commonwealth Parliament have been upheld by the High Court. In the first case[1] the vexed question of the right of the Commonwealth Parliament to permit the taxation of the salary of Commonwealth officers by the Parliaments of the States was decided in favour of the power. The power was granted by the Commonwealth Salaries Act, 1907, No. 7, s. 2, and it was intended thus to remove the difficulty which had arisen under the decisions that taxation of Commonwealth salaries by State Parliaments was an interference with an instrumentality of the Commonwealth. It was argued that the Act which gave power to tax must be invalid as being a breach of the principle that any taxation was an interference with the Commonwealth instrumentality and that the Commonwealth Parliament could not alter this principle. The High Court decided that there was no objection to the

[1] *Chaplin* v. *Commissioner of Taxes for South Australia*, 12 C.L.R. 375. See *Journ. Soc. Comp. Leg.* xii. 97 *sq.*

Commonwealth renouncing its privilege. It was open to the Commonwealth in making a grant of a salary to say that the grant was subject to State taxation, and it was then impossible to say that there was any interference with the free exercise of the Federal power. The Act of the Commonwealth in question was a solemn declaration that State taxation, if it complied with the terms laid down in the Act, was not an interference with the exercise of the powers of the Commonwealth. The principle had been recognised in the United States case of *Van Allen* v. *Assessors*,[1] which had permitted the shares in certain associations being included in the valuation of the personal property of persons or corporations in the system of taxes imposed by or under State authority.

The High Court has also incidentally held [2] that if a municipal corporation is in its governmental functions an agency of a State, and therefore, as such agency, exempt, on the principle of *D'Emden* v. *Pedder*,[3] from Commonwealth jurisdiction, nevertheless, this immunity has no application if the corporation undertakes ordinary trading as opposed to governmental functions.

In the case of *Osborne* v. *The Commonwealth* [4] the question of the validity of the Commonwealth Land Tax Act and the Land Tax Assessment Act, Nos. 21 and 22 of 1910, was directly raised. It was objected to the Acts that as the Land Tax Assessment Act was referred to in s. 2 of the Land Tax Act, which was not in existence as a law on November 16, 1910—being assented to only on November 17, 1910—the reference to it in the former Act, which was assented to on November 16, was meaningless. It was also objected that the Acts were not in substance an exercise of the taxing power of the Commonwealth, but an attempt to regulate land-holding in the Commonwealth, and therefore beyond the powers of the Parliament. Further, it was suggested that the Acts, either together or separately, contravened s. 55 of the Constitution as imposing taxation dealing with more than one subject of taxation. It was also urged that for various reasons several provisions of Act No. 22 were invalid and that the invalid parts were so closely connected with the remainder that the whole Act must be held to be invalid. The Court upheld the validity of the Act unanimously. Griffith C.J.[5] pointed out that the first objection could not be seriously pressed. With regard to the second objection, although taxation might bring about indirect consequences, yet the question of the right to tax could not depend upon the consequences. The objection based on s. 55 of the Constitution took two forms. It was argued that the Acts dealt with more than one subject of taxation, and in particular s. 39 of Act No. 22 imposed taxation on the shareholders of a company which owned land as joint

[1] 3 Wall. 573.

[2] *Federated Engine-drivers and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co. Ltd.*, 12 C.L.R. 398, at pp. 414, 415, *per* Griffith C.J.; at pp. 441-3, *per* O'Connor J.; at pp. 451-3, *per* Isaacs J.; at pp. 427-8, *per* Barton J.

[3] 1 C.L.R. 91. [4] 12 C.L.R 322. [5] 12 C.L.R. 322, at p. 334.

owners in the proportion of their interest in the paid-up capital. Ss. 36, 40, and 41 of the Act were also questioned on similar grounds, but, whether the provisions requiring that certain persons should pay income tax were or were not valid on the ground that the person had no interest in the land, the subject-matter of the taxation was still the land only, and therefore the Act as a whole was not invalid.

The second part of the objection based on s. 55 rested upon the provision of the Constitution that Acts dealing with taxation should deal with the imposition of taxation only. This did not affect, however, the validity of the Act as a whole, the only effect being that any provisions which contravened the section were of no effect.

Of other sections, objection was taken to s. 26 and s. 29, which, it was argued, imposed a tax upon Crown lands which was prohibited by s. 112 of the Constitution. It was also argued that s. 56 and ss. 69-71, which authorised the acquisition of land by the Commonwealth to be held free from State taxation and not applied to Commonwealth purposes, were implicitly forbidden, but it was not necessary to decide this question, for the sections were clearly separable from the rest of the Act, and, therefore, did not affect its validity.

The other justices concurred in the decision that the Acts were valid. The whole of the Court was agreed that the Land Tax Act did not deal with any other subject of taxation than land, and did not in that respect infringe s. 55 of the Constitution. No decision was given on the general question whether s. 55 rendered invalid an Act imposing taxation which dealt with more than one subject of taxation, but Higgins J.[1] doubted whether this was the case, and held that s. 55 permitted as many objects of taxation—persons to be taxed—as Parliament chose and allowed the insertion of any provision which was fairly relevant or incidental to the imposition of taxation on one subject of taxation.

The result of the referenda were substantially as follows: The voting on the trade and commerce amendment showed 958,419 in favour, 982,615 against; on the corporations amendment, 960,711 in favour, 986,824 against; on the industrial matters amendment, 961,601 in favour, 987,611 against; on the railway disputes amendment, 956,358 in favour, 990,046 against; on the trusts amendment 967,331 in favour, 975,943 against; on the monopolies amendment, 917,165 in favour, 941,947 against. The number of ballot papers rejected as informal varied from 81,558 in the case of the industrial matters amendment to 171,658 in the case of the monopolies amendment.

There was a majority against the proposals in New South Wales, Victoria, and Tasmania; there was a majority in favour in South Australia, Queensland and in Western Australia. In 1911 in Western Australia only was there a majority in favour of the referenda and the total majorities against were overwhelming. In the case of the first proposed law which dealt with the matters comprised in the first five of those submitted in 1913, there were

[1] 12 C.L.R. 322, at pp. 372-4.

483,356 votes for, 742,704 votes against; in the case of the second proposed law dealing with the nationalisation of monopolies there were 488,668 votes for, 736,392 votes against.

The differences in the voting were undoubtedly accounted for in a large measure by the fact that the first referendum did not coincide with the general election and that, therefore, neither side polled in anything like full strength. The general election of 1913 resulted in the return of 38 Liberal and 37 Labour members for the lower House, and the resignation of Mr. Fisher's administration. The defeat of the referenda was due to the voting in New South Wales and Victoria, and it was in these states that the Liberal party secured their majority, winning 15 out of 27 and 12 out of 21 seats respectively.

Other factors which are believed to have been of importance were that the first five of the proposals of 1913 were submitted in 1911 in the form of a single law, a fact which deterred some voters from voting at all. Moreover, in 1913 the proposals were not, as in 1911, submitted on the authority of the Labour Government and the Labour majority in Parliament only, but had been formally adopted by the Labour Conference, so that they received the full and undivided support of all the Labour party.

ROMAN LAW IN THE ROMAN DRAMA.

[*Contributed by the* Rev. H. W. P. Stevens, LL.D.]

Law in Literature.—Sir Henry Maine has remarked that "actual examples in the plays of the Latin comic dramatists afford sometimes the most vivid illustrations of the rules of Roman law." The recollection of our own modern literature might well have suggested that this would be the case. For novelists and dramatists can scarcely work out the simplest plot without incidents which involve the law of marriage or of wills or of inheritances or of crime. Alike in England and France the greatest portrayers of human life and character, Shakespeare and Balzac, have often found that they would leave a picture incomplete if they did not throw into it traits borrowed from the experience of lawyers. So frequent are these traits that some have thought that Shakespeare must have been at one time a clerk in an attorney's office—experienced in engrossing deeds, serving writs, and making out bills of costs. And no less a lawyer than Lord Campbell says: "I am amazed not only by the number of Shakespeare's juridical phrases and forensic allusions, but by the accuracy and propriety with which they are uniformly introduced."[1] There is indeed a further side of Shakespeare's legal ponderings which perhaps escaped the notice of so purely professional a student as Lord Campbell, but which has been noticed by Kohler in his comprehensive essay[2] on this side of Shakespeare's work. He writes:

Man hat sich gewundert über die vielen legalen Anspielungen, über die technischen Ausdrücke, der so specifischen, und eigenartigen englischen Prozess und Urkundensprache. Allein viel wichtiger und viel grossartiger ist der idealjuristische Gehalt von Shakespeares Werken: sind die materiellen juristischen Ideen die in seinen Werken leben: sind die welthistorischen Rechtsgedanken, die seine Dramen durchdringen und ihnen ein so erhebendes, tiefes, und grossartiges Gepräge verliehen.

French Dramatists.—To pass from Shakespeare to any French dramatists would be an anti-climax; his nearest counterpart amongst the portrayers of social life in France is the great novelist Balzac. Now Balzac's leading aim was to exhibit types of character by weaving together distinctive idiosyncrasies. To obtain this result he had often to make prominent reference to the operations of law and justice, for those operations must always exercise, directly or indirectly, a profound influence upon the fortunes of

[1] See *Shakespeare's Legal Acquirements*, p. 107.

[2] *Shakespeare vor dem Forum der Jurisprudenz*, Würzburg, 1884.

civilised men, whether as individuals or as agglomerated together in societies. Hence, although Molière left the legal world almost entirely unsatirised, Racine (profiting by the hint which Aristophanes had given him in the *Wasps*) found matter enough for an entire comedy, the *Plaideurs*, in the experiences of law and lawyers that he had obtained in the course of a law-suit which, as he says in his preface, "neither I nor the judges ever quite understood."

Roman Playwrights.—Like Racine and Balzac and Shakespeare, the ancient Roman playwrights must often have had to take cognisance of the actual working of the legal institutions of their day. And the more thoughtful of them can hardly have failed to note the gulf which in every generation lies between those established institutions and the social progress which is constantly outgrowing them. True, there is no trace in Seneca's tragedies of any juristic experience, for they are occupied with declamatory generalisations based on Greek mythology, and not, as Hamlet would have preferred, with the abstract and brief chronicles of the time. But the comic dramatists, Plautus and Terence, give many proofs of their legal knowledge. Of the two, Plautus is much the richer in legal allusions. This is due partly to the relative bulk of the writings of each which have come down to us (there being four times as much matter in Plautus as there is in Terence) and partly to the difference between the respective grades of society depicted by the two dramatists. The language and the springs of action in Plautus are drawn from the tavern and the servants' hall, while those of Terence come, as a rule, from households of law-abiding respectability. Terence, as a rule, deals with honest folk; but Plautus gives us developing or developed rogues. It is obvious which world is richer in legal illustrations. For laws, like "Prince Rupert's Drops," become obvious only by being broken. Through the law comes the knowledge of sin, says the Apostle; and the student of jurisprudence finds it equally true that through men's sins comes his knowledge of their law. Our instances of the legal learning of the Roman stage we may conveniently arrange under Gaius' familiar triplicity—persons, things, and actions.

Law of Persons.—Starting with Gaius' primary division of mankind into freemen and slaves, we find our authors full of references to the class whose forced labour was the basis of the ancient civilisation, and who must have formed a preponderant portion of the population of even republican Rome. In Plautus "the heaven of the slave world is the cellar," and their fate the lash. Take as an evidence of this the speech of the slave Tranio [1]:

> Ecquis homo est, qui facere argenti cupiat aliquantum lucri,
> Qui hodie sese excruciari meam vicem possit pati?
> Ubi sunt isti plagipatidæ ferritribaces viri,
> Vel isti, qui trium numorum causa subeunt sub falas,
> Ubi aliqui quindenis hastis corpus transfigi solent?

[1] *Mostellaria*, II. I. 7-11.

The law would even sanction their being put to torture:

Th. Servos pollicitust dare
Suos mihi omnes quæstioni.[1]

Cicero[2] describes the same state of things. And we know that the *noxæ deditio* of slaves remained unchanged even in Justinian's legislation. But as some mitigation of this harsh condition Plautus shows us[3] how liberty could be purchased by means of the *peculium*:

Le. Auscultate atque operam date et mea dicta devorate.
Primum omnium servos tuos nos esse non negamus:
Sed si tibi argenti minæ viginti proferentur.
Quo nos vocabis nomine? *Ar.* Libertos.

So again[4]:

Co. Censen' talentum magnum exorari potesse
ab istoc sene ut det, qui fiamus liberi?

And similarly Gripus soliloquising says[5]:

Nunc hæc
tibi occasio, Gripe, obtigit, ut liberet te extempulo prætor.
Nunc sic faciam, sic consiliumst: ad herum ut veniam docte atque astu
Pauxillatim pollicitabor pro capite argentum, ut sim liber.

Sometimes, indeed, a slave obtained his freedom from a sheer feeling of gratitude on the part of his master. In the *Pœnulus* (I. I. 1-6) Agorastocles says:

Sæpe ego res multas tibi mandavi, Milphio,
Dubias, egenas, inopiosas consili,
Quas tu sapienter, docte, et cordate, et cate
Mihi reddidisti opiparas opera tua:
Quibus pro benefactis fateor deberi tibi
Et libertatem et multas gratas gratias.

And in the *Menæchmi* (5. 8. 6):

Ob eam rem, quia te servavi, me amisisti liberum.

So in Terence[6] we have the dialogue:

Demea. mea quidem sententia
Judico Syrum fieri esse æquom liberum. *Micio.* Istunc liberum?
Quodnam ob factum?

And Syrus himself then supports the petition by the plea:

Ego istos vobis usque a pueris curavi ambos sedulo:
Docui, monui, bene præcepi semper, quæ potui omnia.

[1] *Mostellaria*, V. I. 38.
[2] *Pro Cluentio*, 63 and 66.
[3] *Asinaria*, 3. 3. 59-62.
[4] *Aulularia*, II. 4. 30. I.
[5] *Rudens*, IV. 2. 21-24.
[6] *Adelphi*, V. 9. 2.

It succeeds, and Micio says:

Tu vis; Syre, eho, accede huc ad me—liber esto.

Here we have a vivid example of *Manumissio inter amicos.* By so purely informal a mode of being set free, Syrus can only have become *Prætoris tuitione liber.*

Yet it was common enough thus to manumit by the master's mere declaration before witnesses that he wished to give a slave freedom and by his treatment of the slave as a freeman. Thus:[1]

Messenio. Sic sine, igitur, si tuom negas me esse, abire liberum.
Menæchmus. Mea quidem hercle causa liber esto atque ito, quo voles.
Mes. Nempe jubes?
Men. Jubeo hercle, si quid imperii est in te mihi.

So Messenio exclaims, now that he is manumitted, "Salve mi patrone." And in the same play, again (V. 9. 85-6):

Messenio. Numquid me morare, quin ego liber ut jusisti, eam?
Menæchmus. Optumum atque æquissumum orat, frater: fac causa mea.
Me. So. Liber esto.

But we find in Plautus examples of a full and formal manumission by the *vindicta*: as in the *Curculio* (I. 3. 56):

Em, istoc verbo vindictam para.

And again:[2]

Toxilus. Dic bona fide: jam libera est?
Dordalus. I, i ad forum, ad prætorem: exquire, siquidem credere mihi non vis.
Libera inquam, est.

Potestas patria.—From the slave to the son was, in early Roman law, no very great transition, as is shown by the pictures which our dramatists have given us of the condition of those under *potestas patria.* Thus a vivid illustration of a father's power over the life of the child is afforded in Terence's *Heautontimoroumenos* (IV. I. 13. 14), where Sostrata, wife of Chremes, comes on the stage in great excitement, because she thinks a ring proves that her infant daughter had years ago been preserved alive and not exposed. She exclaims to Chremes:

Meministin' me esse gravidam, et mihi te maximopere dicere,
Se puellam parerem nolle tolli.

Her husband is portrayed by Plautus as touched by her appeal. But Terence puts no humane words into the mouths of his fathers; not one

[1] *Menæchmi*, V. 7. 41-4. [2] *Persa*, IV. 3. 16. 7.

of them hints at the greater kindness of even the most savage beasts towards their offspring. Nay, in one place the slave Davus says:

> Audireque eorum est operæ pretium audaciam:
> Nam inceptio est amentium haud amantium:
> Quicquid peperisset decrevevunt tollere.[1]

For it was for the father of a child to determine whether it should be brought up; this he did by the symbolical action of raising the infant from the ground. So we have in Plautus[2]:

> Si quod peperissem, id educarem ac tollerem.[3]

Seneca, we know, speaks of the paterfamilias as a *Judex domesticus* and as a *Domesticus magistratus*; and in Terence, and *à fortiori* in Plautus, the paterfamilias has the *Vitæ necisque potestas*: for it was not until the time of Constantine in A.D. 319 that it was enacted that he who had slain his son should incur the penalty of parricide. The paterfamilias could sell his child.[4] In the *Persa* (III. 1. 10-1) a parasite *Saturio*, whose plan is to sell his daughter for the sake of greed, is thus addressed by her, "Tuin' ventris causa filiam vendis tuam?" To which he answers, "Mirum, quin regis Philippi causa aut Attali | te potius vendam, quam mea, quæ sis mea." Naturally, the father could also dispose of his daughter in marriage without her consent. In this scene (l. 55) the daughter says, "verum videto, ubi me voles nuptum dare, | ne hæc fama faciat repudiosas nuptias."

In the *Hecyra* (IV. 4. 82) Pamphilus, dreading that his paterfamilias will exercise his right of preserving the grandchild, says, "Puerum injussu credo non tollent meo." In the *Stichus*, Antipho assumes the prerogative of a father, and wishes his daughters Philamena and Pamphilia to marry again, their husbands, among other delinquencies, not having been heard of for three years. So one of them says (I. I. 49-51):

> Nolo ego, soror, me credi esse immemorem viri,
> Neque ille eos honores, mihi quos habuit perdidit
> . . . . .
> Neque est cur nunc studeam has nuptias mutarier:
> Verum postremo in patris potestate est situm
> Faciundum id nobis quod parentes imperant.

But Plautus does testify to a softening of the ferociousness of these old-

[1] *Andria*, I. 3. 12-4.
[2] *Truculentus*, II. 4. 47.
[3] Cf. Horace (Sat. II. 5. 45):
> Si cui præterea validus male filius in re
> Præclara sublatus aletur.

[4] *Andria*, V. 3. 20.

world rights, this *potestas vitæ necisque.* In the *Asinaria* (I. I. 50-4) we find Demænetus saying:

> Omnes parentes, Libane, liberis suis,
> Qui mi auscultabunt, facient obsequentiam.
> Quippe qui mage amico utantur gnato et benevolo.
> Atque ego me id facere studeo: vol amari a meis
> Volo me patris mei similem. . . .

And similarly in the *Bacchides* (3. 3. 4) Philoxenus wisely remarks:

> Heia, Lyde, leniter qui sæviunt, sapiunt magis.
> Minus mirandumst, illæc ætas si quid illorum facit,
> Quam si non faciat. Feci ego istæc itidem in adulescentia.

Beyond his obedience in conduct the filius familias also owed to his paterfamilias something of subjective sentiment—that state of feeling which the Romans described as *pietas.* In the *Pseudolus* (I. III. 71-2) Calidorus says:

> Egon patri surripere possim quidquam, tam cauto seni?
> Atque adeo si facere possem, pietas prohibet.

A pathetic illustration of this filial loyalty is given in the *Trinumus* (2. 2. 24), where Lysiteles says to his father Philto:

> Semper ego usque ad hanc ætatem ab ineunte adulescentia
> tuis servivi imperiis servitutem et præceptis pater.
> Pro ingenio ego me liberum esse ratus sum: pro imperio tuom.
> Meum animum tibi servitutem servire, æquom censui.

But though thus at the mercy of the father and destitute of legal ownership the filius familias had, on the other hand, an inherent co-proprietorship with the paterfamilias in the patrimonium of the familia. Utterly at variance with our modern conceptions as is such a right, it was nevertheless a fundamental doctrine throughout all the early Aryan races in Europe and in Asia. Sir Henry Maine says:

> The ancient German law, like the Hindoo jurisprudence, makes the male children co-proprietors with their father, and the endowment of the family cannot be parted with except by the consent of all its members.[1]

Similarly under Roman law Hegio says to his son in the *Captivi* (V. i. 5), "Quomque hunc conspicio in potestate *nostra*," in recognition of his ownership. And in the *Trinumus* (II. 2. 51-2) we have

> *Philto.* Nempe de tuo?
> *Lysiteles.* De meo: nam quod tuom est, meum est: omne meum autem tuomst.

Hence the paterfamilias and the filius familias had a common interest

[1] *Ancient Law*, with intro. by Sir Frederick Pollock, p. 210.

in the growth or shrinkage of the family patrimonium. In the *Trinumus* (IV. I. 19. 20) Charmides, after his return from the perils of the sea, says in his soliloquy:

Satis partum habeo.
Quibus ærumnis deluctavi, filio dum divitias quæro.

Plautus shows too how a good filius familias would take special care of the patrimonium, when Lydus says:

Hic enim rite productus patri:
In mare it; *rem familiarem curat:* custodit domum:
Obsequens obediensque est mori atque imperiis patris.[1]

Moreover, when considered apart from his dependence on the paterfamilias the filius familias might receive the title of *Herus* or *Dominus*. Thus in the *Asinaria* (II. II. 62. 3) Leonida asks:

Ubinam est herus?
Li. Maior apud forum est, minor hic intus est. . . .

Finally on the death of the paterfamilias all his powers are released to the son, now in his turn a paterfamilias. So we find (*Mostellaria*, I. III. 76. 7) Philolaches saying: "Utinam meus nunc mortuus pater ad me nuntietur: ut ego exhæredem meis rebus me faciam, atque hæc sit hæres."

There is a misleading analogy between the words paterfamilias and materfamilias (the latter of which was, by an embarrassing confusion, applied not only to women who were *sui juris*, but also to those who were *in manu mariti*). It must not betray us into supposing that the materfamilias could ever possess *potestas* over her children. Yet Imperium, however, is sometimes attributed to her. Thus in the *Heautontimoroumenos* (II. I. 1-5) Clinia says:

. . . vereor, ne mulier, me absente, hic corrupta sit.
Concurrunt multæ opiniones quæ mihi animum exaugeant:
Occasio, locus, ætas, mater *cujus sub imperio* 'st mala:
Cui nil præter pretium dulce 'st.

Hereditas.—The Hereditas of the paterfamilias was transmitted to those who in the life-time of the paterfamilias had a kind of condominium in that hereditas, *i.e.* to the *sui heredes*. That among these were naturally reckoned the children actually born from the father's wife we are reminded by the lines:[2]

Utinam meus nunc mortuus pater ad me nuntietur:
Ut ego exhæredem meis bonis me faciam, atque hæc sit hæres.

And Plautus mentions the further case of children by adoption:[3]

Adoptavit illum puerum surrepticium
Sibi filium eumque heredem fecit, quom ipse obiit diem.

[1] *Bacchides*, III. 43. 53. [2] *Mostell.* I. 3. 76-7. [3] *Men.* Prol. 60-2.

Marriage Law.—The powers of the paterfamilias were, of course, closely connected with the Roman idea of marriage. From the intensity of the primitive Aryan conception of the cohesion of the family throughout successive generations, it naturally followed that with the early Romans, as with the modern Hindoos, marriage was for every man a religious duty—a duty he owed to his ancestors as well as to himself. A man had to continue his race: for the happiness of the dead depended on the ancestral worship being carried out by those descended from the ancestors now dead. As might be expected, we get from the play-writers several hints as to the way in which marriage was treated by the Romans; for in Plautus and Terence without the love affairs of the younger characters the comedies would have no *raison d'être*. A very lofty view of marriage was taken by the primitive Romans, and consequently of the parental and personal relationships of the married pair which grow from it. Marriage was viewed as a cohabitation between the parties for life with mutual affectionate help—the *Individua Vitæ Consuetudo* of the famous definition by Modestinus. In accordance with this, we find in Plautus:[1]

> Edepol me uxori exoptatum credo adventurum domum,
> Quæ me amat: quam contra amo; præsertim re gesta bene,
> Victis hostibus; . . .

and again (219-22):

> Non ego illam mihi dotem duco esse, quæ dos dicitur;
> Sed pudicitiam et pudorem et sedatum cupidinem,
> Deûm, metum, parentum amorem et cognatûm concordiam,
> Tibi morigera atque ut munifica sim bonis, prosim probis.

From this naturally arose a general repugnance to second marriages:[2]

> *A.* Pol ego uxorem quæro, postquam vostra mater mortuast.
> *P.* Facile invenies et pejorem et pejus moratam, pater,
> Quam illa fuit; meliorem neque tu reperies neque Sol videt.

But this solemnity of the obligations of marriage did not cause any stress to be laid on contracting it by solemn ceremonial. We easily discover, from various allusions in both dramatists, that amongst non-patricians marriage needed no prescribed ritual and the intervention of no public functionary, in fact nothing more than the interchange of deliberate nuptial consents before the bride's home-taking. Yet a religious ceremony was not unusual. Thus in the *Phormio* (IV. 4. 18-21) Geta says:

> Audi nunc contra jam. Si argentum acceperit,
> Ducenda est uxor, ut ais: concedo tibi:
> Spatium quidem tandem apparandis nuptiis,
> Vocandi *sacrificandi* dabitur paululum;

[1] *Amph.* 2. 2. 31. [2] *Stich.* I. 2. 51-3.

and in the *Adelphi* (IV. 5. 65) Micio exclaims, "Abi domum, *ac deos comprecare* ut uxorem accersas: abi," where the religious injunction is probably no mere conventionalism.

We find several references to the one essential external act of this great legal transaction, the Deductio of the bride *in domum mariti* (the counterpart in the law of persons of the *traditio*, of *res nec mancipi* in the law of things). It is presented to us as the criterion of the completed marriage. Thus, Euclio, in apostrophising the goddess Fides, exclaims:[1]

> Nunc lavabo, ut rem divinam faciam, ne affinem morer,
> Quin ubi arcessat, meam extemplo filiam ducat dimum.

In the *Phormio* (IV. 4. 12) Antipho says, "Dotem si accipiet uxor ducenda est domum," and in the *Adelphi* (III. 4. 25. 6) Hegio says:

> Venit ipsus ultro, lacrumans, orans, obsecrans,
> Fidem dans, jurans se illam ducturum domum.

Mention is made by Plautus[2] of a ceremony which accompanied this in *domum deductio* of the bride:

Hosce ut accipias coquos | tibicinamque obsoniumque in nuptias. | Megadorus jussit Euclioni hæc mittere.

And again:[3] "Age tibicen, dum illam educunt huc novam nuptam foras, | suavi cantu concelebra omnem hanc | plateam hymenæo." And (IV. 4. 1-2) " | sensim superattolle limen pedes, nova nupta: sospes | iter incipe hoc."

The Dos.—With marriage was connected the custom of the *Dos*, brought by the bride to the husband for the purpose of contributing by it to defray the burdens of the household. The presence of this *Dos* essentially distinguished a marriage from mere concubinage. The *Dos* is most commonly *Profectitia*, the gift of the bride's father. So we have,[4] "Thesaurum effodiebam intus dotem filiæ | tuæ quæ daretur." And again:[5]

> Ubi tu's quæ deblaterasti jam vicinis omnibus
> Meæ me filiæ daturum dotem.

Sometimes, on the other hand, the *Dos* is not handed over at once, but only covenanted for, as in *Pœn.* V. 4. 123-4:

Ag. Patrue, face tu in memoria habeas, tuam majorem filiam | mihi te despondisse. . . . *Ha.* Memini. *Ag.* Et dotis quid promiseris.

Although we have no reference to the *Dos* in the surviving fragments of the Twelve Tables, we may infer from Plautus that it must have been of the greatest antiquity. In his plays a *Dos* often affords the dramatic

[1] *Aulularia*, IV. 2. 5. 6.
[2] *Aulul.* II. 6. 2-4.
[3] *Cas.* IV. 3. 1-3.
[4] *Trin.* IV. 4. 8-9.
[5] *Aulul.* II. 3. 1.

motive, as in the *Trinumus* (IV. 4. 8. 9), where Callicles says, "Ego dicam tibi. Thesaurum effodiebam intus, dotem | filiæ tuæ quæ daretur." In the larger number of instances, unhappily, the *Dos* is given by the wife to the husband not really to provide for household expenses, but rather as a means for the man to release himself from toil and to live at ease, on condition that the *Imperium* rightfully belonging to him should be abandoned to the wife. So we find:[1] "Argentum accepi: dote imperium vendidi." And again:[2]

> Sed, ut inops infamis ne sim: ne mi hanc famam differant,
> Me germanam meam sororem in concubinatum tibi,
> Sic sine dote, dedisse magis, quam in matrimonium.

Like many a modern playwright, Plautus alludes to the excessive power which a well-dowered wife may be found arrogating. Thus,[3] "Ita istæ solent, quæ viros subservire | sibi postulant, dote fretæ, feroces."

Marriage Ceremonies.—As the ceremony of *Justæ nuptiæ* was strictly technical, a matter of *jus civile* not of *jus gentium*, a *civis Romanus* could not marry with full legal effect a *peregrina*, there being no *connubium* between the two. Thus in the *Andria* the father is angry with his son for taking to himself a foreign girl, an act which was "Præter civium morem atque legem," and moreover for deciding not to expose the child which might be born to them:[4] "Nam quod peperisset, jussit tolli. | . . . Adeon' est demens? Ex *peregrina*!" For as we have seen, the paterfamilias had to give his consent to the rearing of any grandchild that was under his *potestas*. From the time of the Republic we are struck by an ever-increasing disregard of the marriage tie. We may say that the Roman wife of the late Imperial period was more privileged than her English sister; but the early Roman wife had not that freedom from all castigation of her person and all restraint on her liberty which English wives have had since (at any rate) the famous *Jackson's Case*[5] of our own day. A well-considered marriage was usually preceded, naturally, by a ceremony of *sponsalia*. In Plautus we find many examples of this *sponsio* of a bride by her male relative. Take, for instance, this:[6]

> *Philto.* Nunc tuam sororem filio posco meo:
> Quæ res bene vortat. Quid nunc? Etiam consulis?
> *Lesbonicus.* Quid istuc? Quando ita vis: di bene vortant, spondeo.

So again in the *Pœnulus* (V. 3. 41. 3):

> *Agorastocles.* Audin' tu, patrue? Dico, ne dictum neges:
> Tuam mihi majorem filiam despondeas.
> *Hanno.* Pactam rem habeto. *Ag.* Spondesne igitur?
> *Ha.* Spondeo.

[1] *Asin.* I. 1. 73.
[2] *Trin.* III. 2. 63-5.
[3] *Men.* V. 2. 15-6.
[4] *Andria*, III. 1. 6.
[5] [1891] 1 Q.B. 671.
[6] *Trinum.* II. 4. 170. 2.

So also we find in the *Aulularia* (II. 2. 77-8):

Meg. Quid nunc? Etiam mihi despondes filiam?
E. Illis legibus,
Cum illa dote quam tibi dixi.
M. Sponden' ergo?
E. Spondeo.

And other instances occur in the *Phormio* (IV. 3. 49. 52). And from the *Andria* (I. 1. 72-5) we see that a son could be given in betrothal:

Quid verbis opus est? Hac fama impulsus Chremes,
Ultro ad me venit, unicam gnatam suam
Cum dote summa filio uxorem ut daret.
Placuit; despondi. Hic nuptiis dictus est dies.

And the consent of this prospective bridegroom was not indispensable. This son says, soon afterwards (I. 5. 13, 14):

Quot modis contemtus, spretus? facta, transacta omnia hem
Repudiatus repetor. Quamobrem?

The repudiation shows that there had been valid sponsalia. The two immediate parties to the on-coming marriage participated in the contract: and so also might others, acting as *fidepromissores*, especially when it was a question of a woman who was subject to agnatic tutorship. Yet in betrothal, just as in marriage, it was indispensable to have the consent of the elders in whose power the contracting parties were. It might, however, happen that no actual marriage followed the espousals, for either of the parties might lawfully refuse to carry out the contract to marry. So we find:[1]

L. Is me nunc renuntiare repudium jussit tibi.
E. Repudium, rebus paratis, exornatis nuptiis?

To intimate such a breaking-off of the engagement a *nuncius* was sent, as in the *Phormio* (IV. 3. 72-3), "Illis repudium *renunciet.* | Hanc ducat."

Yet the Roman law, in contrast to this elaborate body of regulations concerning the sponsalia and marriages of free persons, entirely ignored all jural character in such regulations amongst slaves. In the prologue of the *Casina* (67-70) we are reminded that slaves enjoyed no matrimonium, in the words:

Sunt hic, quos credo nunc inter se dicere:
Quæso hercle, quid istuc est? *Serviles nuptiæ?*
Servine uxorem ducent aut poscent sibi?
Novum attulerunt, quod fit nusquam gentium.

In the case of this unnatural custom Plautus pleads to a certain extent for the down-trodden by adducing the customs of Greece, Carthage, and Apulia.

[1] *Aulul.* IV. 10. 57-8.

Position of the State.—From the life of the family we may pass to that of the State. In the time of Plautus the old antagonism between cives had ceased to exist. An element of cosmopolitanism had by degrees become inoculated into Roman law, and in the day of Plautus it had grown strong. But illustrations of all this do not abound in him or even in Terence, owing to their habit of laying the scenes of their dramas abroad and not on the soil of Rome. Yet they remind us how the Romans, with a profounder genius for government than that of President Kruger, had seen the wisdom of conceding to the outlander an inherent right to personal protection; for we find:[1]

> O facinus indignum et malum!
> Epidamnii cives, herum
> Meum hic in pacato oppido
> Luci deripier in via,
> Qui liber ad vos venerit

And foreign merchants, even when unprotected by the *jus civile*, had become shielded by the *jus gentium*, through its ready employment of *recuperatio*.[2]

> Quis est mortalis miserior qui vivat alter hodie
> Quem ad recuperatores modo damnavit Pleusidippus?

So we find:[3]

> Postquam quidem prætor recuperatores dedit,
> Damnatis demum, vi coactus, reddidit
> Mille et ducentos.

The citizen's proprietary rights are at times referred to by our authors. There even occur occasional references to mere fractional rights, like *habitatio*; as in the words[4] "Usus, fructus, victus, cultus jam mihi haruncce ædium | interemtust, interfectust, alienatust." But far more frequently is the full dominium spoken of. We find in Plautus the following notions wrapped up in the idea of it: (1) An indefinitely extensive power of enjoyment; (2) the exclusiveness of this right; (3) its perpetuity. Thus an owner may do as he pleases with his property. So:[5]

> *Ca.* Meam tu amicum vendidisti? . . .
> *Ca.* Cur id ausus facere? *Ba.* Lubuit: mea fuit.

And another may not meddle with his property:

> Cur id ausus's facere, ut id, quod non tuom esset targeres?[6]

and

> Nemo ire quenquam publica prohibet via
> Dum ne per fundum septum facias semitam.[7]

[1] *Men.* V. 7. 15-17.
[2] *Rud.* V. 1. 1.
[3] *Bacc.* II. 3. 36-8.
[4] *Merc.* V. 1. 3-4.
[5] *Pseud.* I. 3. 124.
[6] *Aulul.* IV. 10-14.
[7] *Curc.* I. 1. 35-36.

Various means of acquiring ownership are referred to; as, for instance, seizure in war. "Præda atque agro adoreaque adfecit populares suos:"[1] and[2] "Ille me qui cepit dat me dono huic militi." So again[3]

> At erit mi hoc factum mortuo memorabile
> Meum erum captivum ex servitute atque hostibus
> Reducem fecisse liberum in patriam ad patrem.

Again we find the *occupatio* of ownerless wild things:[4]

> Ecquem esse dices in mari piscem meum?
> Quos quum capio, siquidem cepi, mei sunt: habeo pro meis,
> Nec manu adseruntur neque illinc partem quisquam postulat;
> In foro palam omnes vendo pro meis venalibus.
> Mare quidem commune certost omnibus.

Delivery, again, was a common mode of acquisition; we have examples of it in the following: "O Libane, mi patrone, mihi *trade* istuc,"[5] and "Pisto ipsi facito coram ut *tradas* in manum."[6]

Treasure Trove.—Treasure trove, in the same way, went in the time of Plautus to the finder: the State not as yet claiming any share. So[7]

> Ejus honoris gratia
> Feci, thesaurum ut hic reperiret Euclio,
> Quo illam facilius nuptam, si vellet, daret;

and (IV. 2. 3-4):

> Edepol ne illic pulcram prædam agat, si quis illam invenerit
> Aulam onustam auri.

But in one place[8] where we have a question of treasure trove,

> An ego alium dominum paterer fieri hisce ædibus?
> Qui emisset, ejus essetne ea pecunia?

Plautus seems to think that the owner of the premises where the thing is found has a right of ownership; Hadrian ultimately recognised this,[9] "At si quis in alieno loco, non data ad hoc opera, sed fortuito invenerit, dimidium inventori, dimidium domino soli."

Still a thing could only be acquired as treasure-trove, if there were ignorance on the part of the owner: he must not have merely hidden it, but have actually lost and forgotten it. This constituted the legal essence of treasure-trove; it must be a "depositio cujus non extat memoria."[10] Any hidden object not so forgotten could not be acquired by the finder: as it remained the property of the original owner. We read:[11] "Furtum ego vidi qui faciebat; | Noram dominum id quoi fiebat, | post ad furem egomet devenio."

[1] *Amp.* I. 1. 38.
[2] *Mil. Glor.* II. 1. 42.
[3] *Capt.* III. 5. 26-8.
[4] *Rud.* IV. 3. 43.
[5] *Asin.* III. 3. 99.
[6] *Merc.* II. 2. 7.
[7] *Aulul.* Prol. 25-7.
[8] *Trin.* I. 2. 140-1.
[9] Just. Inst. 2. 1. 39.
[10] *Dig.* 41, 1. 31. 1.
[11] *Rud.* IV. 3. 21-2.

The true owner of a lost article might always demand back his property, on proving satisfactorily his title (subject, of course, to such rights as the finder of the lost article might have come to acquire over it by *usucapio*, as a bona fide possessor). This necessary proof would very often be made by simply giving a correct description of the thing, thus :[1] "Cistellam isti inesse oportet caudeam in isto vidulo : | ibi ego dicam quidquid inerit nominatim : tu mihi | nullus ostenderis. Si falsa dicam, frustra dixero."

Law of Contract.—From the topic of ownership it is an easy transition to that of contract. Plautus corroborates the view that in the early republic none but customary rules governed in the sphere of contract. We infer from his plays that the mere agreement of the wills of the assenting parties is the most frequent *causa* of obligations ; their guarantee being good faith. And this was no vain guarantee. As Muirhead tells us :[2] "Some of the old writers say that the seat of fides was in the right hand : and that to give it in making an engagement was emphatically a pledge of faith." Perhaps then the expression *Promittere Dextram* was the origin of the familiar later sense of promittere, "Our Promise." With Plautus *contrahere* means the act of two or more in bringing about any event. Thus we find this technical use of the word *contrahere* in connection with Litigium :[3] "Nam ego aliquid contrahere cupio litigii inter eos duos." This is interesting as suggesting that the metaphor underlying *contractus* is that of the connecting of the parties (not, as it is in *nexum* and in *obligatio*, with each other, but) with some intended result. Plautus gives us some interesting cases of contracts made by persons who were juridically incompetent to make them, as being under anomalous conditions ; but even these transactions follow the broad outlines of the normal law. Thus in an *Emptio Venditio*, even when concluded between two mere slaves and for some trifling object, Plautus is still careful to represent as essential the payment of a price on the one part and the transfer of the object on the other. Again, although in the time of Plautus damnified parties had not the remedy of the *exceptio doli*, yet he shows that each case was weighed on its merits by the magistrate, and the *sponsio præjudicialis* would be accommodated to the particular circumstances. Thus[4] where there is a question of presenting a reward for giving up a certain bag, and Labrax, who is going to plead the *Lex Lætoria*, wishes to have some points settled beforehand by the Judex, he says : "Cedo quicum habeam judicem | (Sc. to see whether) ni dolo malo instipulatus sis nive etiamdum siem | minus quinque et viginti annos natus."

Gaius tells us of the ancient contract of *sponsio*, a form reserved exclusively for citizens. It occurs in Plautus :[5]

Megadorus. Quid nunc ? Etiam mihi despondes filiam ? *Euclio.* Illis legibus, cum illa dote, quam tibi dixi. *Me.* Sponden' ergo ? *Eu.* Spondeo.

[1] *Rud.* IV. 4. 89-91.
[2] *Roman Law*, p. 50, n. 2.
[3] *Casina.* III. II. 31.
[4] *Rudens*, V. 3. 22-6.
[5] *Aulularia*, ii. 2. 77-8.

Euclio's "lex" here means only a clause in the contract, as in the familiar phrases "lex mancipii" and "lex commissoria."

Side by side with this formal and purely Quiritarian *sponsio* we have later and more elastic forms of *stipulatio*, thus: [1]

Hegio. Num quæ causa est, quin, si ille huc non redeat, viginti minas | mihi des pro illoc? *Tyndarus.* Optume immo.

Mutuum.—The history of the four real nominate contracts is more obscure, because more ancient, than that of the consensual ones. The *mutuum* is the earliest form of the *creditum*, and Plautus in a great number of his scenes shows the relationship between it and the general idea of loan. The traditional conception of the *mutuum* was that no consideration was to be given for the accommodation. The donor gave to the donee a certain quantity of *res fungibiles* on the understanding that an equal amount of similar things should be returned to him at a certain date. Thus in the *Asinaria* (I. 3. 95) Argyrippus, who is at a loss to raise twenty minæ, says he will try all his friends both good and bad, "Nam si mutuas non potero, certum est suman fœnore." And soon afterwards (III. 3. 135), when Libanus liberally says to him "Exopta id, quod vis maxime tibi evenire: fiet," Argyrippus replies that he can but wish for what he wants, "Viginti argenti commoda minas, hujus quas dem matri." In the *Curculio* (I. 1. 67-8) Phædromus says, "Parasitum in cariam misi meum | petitum argentum a meo sodali mutuom." And in the *Persa* (I. 1. 5, 6) the unlucky Toxilus complains, "Fio miser quærendo argento mutuo; nec quidquam, nisi 'non est,' sciunt mihi respondere, quos rogo." And again (III. 37, 8), "Tecumque oravi, ut nummos sexcentos mihi | dares utendos mutuos." So in the *Pseudolus* (I. 1. 78), "Miser sum: argentum nusquam invenio mutuom." And (*ibid.* 83. 4)

Sed potes nunc mutuam
Drachmam dare unam mihi, quam cras reddam tibi.

Again (*ibid.* 3. 66) Ballio says, "If you had been in love you would have procured the money": for four courses were open. (1) "invenires mutuom"; (2) "ad danistam devenires"; (3) "adderes fœnusculum"; and in the last resort (4) "surriperes patri." Not indeed that the *mutuum* was always, as in these cases, of money. We find [2]

Crocotium. . . . Tritici modios decem
Rogare, opinor, te volt. *Ge.* Mene? ab se ut petam?
Cr. Imo hercle, ut abste mutuom nobis dares.

In the *Trinumus* (III. 2. 101-2) Stasimus the slave has made a loan of some £200: a larger sum than we might expect a slave to possess. For he says:

Ad forum ibo: nudius sextus quoi talentum mutuom
Dedi, reposcam: ut habeam mecum, quod feram viaticum.

[1] *Captivi*, II. 3. 103. 4. [2] *Stichus*, II. 1. 98-100.

Terence has a mention of *mutuum* in his *Heautontimorumenos* (III. 3. 40), where Syrus relates how Becchis had made a loan of some £32, "Huic drachmarum argenti hæc mille dederat mutuum." In the time of Plautus the old gratuitous *mutuum* was already becoming a somewhat rare exception; and the *mutuum* with interest was now the habitual form of loan. The negotiation might be effected by the assistance of the private *Danistæ* or of the public *Argentarii* or *Trapezitæ*. In the *Curculio* (IV. 2. 22) the hero, classing together procurers and bankers, says of them, "Vos fœnore homines hi male suadendo et lustris lacerant." And in the *Epidicus* (I. 1. 51-2) Thesprio says, "Id adeo argentum ab danista apud Thebas sumpsit fœnore | in dies minasque argenti singulas nummis." This was the usual interest *per mensem*. And a little later in the next scene (2. 11-12) Stratippocles begs Cheæribulus "Argenti dare quadraginta minas, | quod danistæ detur, unde ego illud sumpsi fœnore." And in the *Mostellaria* (III. 1. 58) we have

Tranio. Sortem accipe. *Danista.* Imo fœnus: id primum volo.

For if the usurer were to take the principal without some separate and strictly formal contract (*e.g.* a *stipulatio*) to secure the interest, he could claim none. For at this epoch many still held the unsophisticated opinion that it was unnatural, and therefore immoral, for money—Shakespeare's "barren metal"—to breed money. A little later on (62-4) we read:

An mavis, ut abeat foras,
Urbem exul linguat, actus hinc causa tui?
Quin sortem potius dare licet.

And we get a spirited struggle with the usurer (67-71):

Tranio. Tu solus, credo, fœnore argentum datas?
Danista. Cedo fœnus! redde fœnus! fœnus reddite!
Daturin' estis fœnus actutum mihi?
Date mihi fœnus! *Tr.* Fœnus illic, fœnus, Hic!
Nescit quidem nisi fœnus fabularier!

In the *Asinaria* (I. 3. 95) we have the contrast between the *mutuum*, a mere contract *re* for the return of the principal and the formal contract *verbis* for the *fœnus*, "Nam si mutuas non potero, certum est, sumam fœnore." Since interest thus needed a formal contract, by *stipulatio* or *literis*, to secure it, its final payment would be formally recorded by an *accepti relatio*, as part of a written entry, *literis*. Thus[1] "Prius quæ credidi, vix anno post exegi: | nunc satagit: abducit domum etiam ultro et *scribit nummos*." On the other hand, though the *commodatum* originally bore a very near relationship to the *mutuum*, we do not find it changing its primitive character by any similar development. Instances of this original form survive in Plautus: we see it in the expressions *Utendum dare* and *Commodare*. The *commodatum* is used by neighbours and friends among themselves, and is found especially

[1] *Asin.* II. 4. 33-5.

concerned with trivial things of every-day life. Thus in the *Aulularia* (I. 3. 18-19), "Quæ utenda vasa semper vicini rogant, | fures venisse atque abstulisse dicito." And in the *Asinaria* (II. 4. 38-9):

Leonida. Scyphos quos utendos dedi Philodamo rettulitne?
Libanus. Non etiam. *L.* Em rem sis perdere, da commoda homini amico.

Of the *depositum* we have examples. "Dedistin tu, Argentum? Immo, apud trapezitam situmst."[1] The braggart Therapontigonus threatens the banker Lyco thus:

Nunc nisi tu mihi propere properas dare jam triginta minas,
Quas ego apud te deposivi, vitam propera ponere.

And, further on (17, 20), we see how it was customary for the *depositum* to be returned on the demand of the *depositor*:

Quod mandasti, feci tui honoris gratia,
Tuom qui me signum ad me attulisset, nuncium ne spernerem.

Sometimes the *depositum* was safeguarded by a religious sanction. Thus[2] "Nos apud Theotimum omne aurum deposivimus, | qui illic sacerdos est in Dianæ Ephesiæ." And again (101):

Nicobulus. Sed qui præsente id aurum Theotimo datumst?
Chrysalus. Populo præsente: nullust Ephesi, quin sciat.

Pignus.—The contract of Pledge was also familiar to the dramatists. Plautus makes clear references to rights granted over a thing by the debtor to the creditor as a guarantee for his debt. The word "debt" must not here be confined exclusively to its modern popular meaning, for in Plautus it embraces wider references and associations. It frequently occurs in case of debts arising from dealings consequent upon a wager either private or forensic. (Indeed, it is precisely in this—according to some legal writers—that the explanation of the term *Pignus* lies: it being a material guarantee given by the debtor to the creditor in pursuance of a juridical obligation of this kind.) So we have[3] "ut his in cavea pignus capiantur togæ," and[4] "Ne ego cum illo *pignus* haud ausim dare." Somewhat akin to the *pignus* is the Earnest, the coin or other material object given by one contracting party to the other to serve as evidence that the contract has been finally concluded. Moreover, besides being thus an obvious proof that the stage of mere initiatory negotiations was at an end, it served also as a penalty (established by a silent agreement between the parties) to be forfeited in the event of either of them failing to fulfil the obligation undertaken by him. Even as early as the time of Plautus this earnest was usually denoted by

[1] *Curc.* II. III. 66; *Ibid.* IV. III. 3-4.
[2] *Bacc.* II. 3. 72-3.
[3] *Amp.* Prol. 68.
[4] *Bacc.* IV. 9. 133.

the title of *Arrha* or *Arrhabo*. We find[1] "Hunc *Arrhabonem* amoris primum a me accipe," and[2] "Sed *arrhaboni* has dedit quadraginta minas." And similarly:[3]

> Minis triginta sibi puellam destinat
> Datque arrhabonem et jurejurando adligat.

In Plautus it is in dealings amongst Peregrini that the Arrha is most frequently used; but it has already acquired a penal as well as a probative character.

Besides these Real contracts we find frequent examples of Consensual ones. We find, for instance, the *Locatio Conductio* existing already in a highly developed state. It has become sharply differentiated from the *Emptio Venditio*; although traces still survive of the earlier intimate relationship between the two, as in the interchangeability of the older general phrase *Pretium* and the new specialised term *Merces*. In the *Pseudolus* (III. 2. 59-60) the cook, explaining that he is a very high-priced personage, exclaims, "Verum pro pretio facio ut opera appareat | mea, quo conductus venis." And, similarly,[4] the protest "Ni huic verri adfertur *merces*, | non hic suo seminio quamquam porcellam impartiturust" is followed by the words "Dabitur quantum ipsus *preti* poscet." It is important to notice the distinction between the two widely diverse forms of this contract: there is the *Locatio Conductio Rei*, a contract having for its purpose the temporary concession, by the one party, of a *Res Corporalis*, an Austinian "thing," and the reception of it by the other for the purpose of using it. There is also the *Locatio Conductio Operarum*, where no such "thing" is concerned, but only some "act"; in this latter form of the agreement, the one contractor, in return for a fixed remuneration, undertakes to perform some personal exertion for the advantage of the other party, though without necessarily defining the ultimate object of the exertions. Thus[5] we have an example of hiring a cook's services: "Postquam obsonavit erus et conduxit coquos | tibicinasque hasce apud forum," and[6] "Nummo sum conductus; plus jam medico mercedest opus." And there is[7] Mercurius's exclamation, "Optumo optume optumam operam das, datam pulcre locas." So the prologue to the *Asinaria* (1-3) says with reference to the managers of the theatre, who were paid by the Ædiles:

> Hoc agite, sultis, spectatores, nunc jam:
> Quæ quidem mihi atque vobis res vortat bene,
> Gregique huic et dominis atque conductoribus.

In Plautus we even find references to some of the occasional modifications of this contract. In the *Asinaria* (I. 3. 76-8), for instance, there is a *Lex*

[1] *Mil. Glor.* IV. I. 11.
[2] *Mostell.* III. I. 111.
[3] *Rud.* Prol. 45-6.
[4] *Mil. Glor.* IV. 2. 67-9.
[5] *Aulularia*, II. 4. 1, 2.
[6] *Ibid.* III. 2. 34.
[7] *Amphitruo*, I. I. 124-5.

Commissoria in the Locatio Conductio Operarum which the youth and the procuress arrange for:

A. Mane, mane! audi! Dic, quid me æquom censes pro illa tibi dare,
Annum hunc ne cum quiquam alio sit? *C.* Tene? Viginti minas,
Atque ea lege: Si alius ad me prius attulerit tu vale.

The pictures drawn by Plautus represent the ancient *Romana Fides* as already tending to be rather a mere tradition than a reality. It is significant to find no comedy of his which does not inveigh most sturdily against the "Fraudulentos," "Legirupas," and "Sacrilegos," who did not hesitate to break their pledged word. Evidently the ethical reverence for *bona fides* was not of itself strong enough to safeguard business transactions without jural pressure. Yet, though honest dealing was of essence of the contract of *Emptio Venditio* it would seem that we can hardly assume that any *Actio Empti* to secure pecuniary compensation for a defrauded purchaser had come into existence in the time of Plautus. There are, however, passages which suggest that a rule was already established by which the vendor was recognised as entitled to get back the subject-matter sold.

Law of Sale.—Many are the references to Sale, as in the *Asinaria* (2. 4. 30):

Le. Sed *vina* quæ heri vendidi vinario Serambo, | jam, pro iis satisfecit Sticho?
Lib. Fecisse satis opinor.

Or again,[1] "et si qua inutilis pictura sit, eam vendat." By Roman Law it was essential to a true sale that the price should be in coin; a barter in kind was no *Emptio Venditio*. Accordingly we find in Plautus that every sale that occurs is for a money price. Thus,[2] "*Vendidit* patri meo te *Sex Minis*," and (II. 2. 7, 8) "Tam grandi sim mercatus præsenti pecunia."[3] Illustrations occur of the obligation of the buyer to pay the price; thus:[4] "Mi illam ut tramittas *argentum accipias*," and the seller is shown as similarly bound by his reciprocal obligation of delivering the thing sold.[5] And again, as warranting the good quality of the thing sold,[6] "Sanum futurum, mea ego id promitto fide." Moreover he had to warrant the vendee's title. Thus we read:[7]

P. Quis tibi hanc dedit mancupio aut unde emisti? Fac sciam.
T. Ego quidem pro istac rem solvi ab trapezita meo:
Quam ego pecuniam quadruplicem abs te et lenone auferam.

And again,[8] "Promisistin', si liberali quisquam hanc adsereret manu, te omne argentum redditurum?" We have also allusions to the possibility

[1] *Asinaria*, IV. I. 18-19.
[2] *Capt.* V. 4. 14-5.
[3] Cf. *Asin.* II. 3. 16, and *Curc.* III. 1. 87-9.
[4] *Epid.* III. iv. 31.
[5] *Curc.* IV. 4. 8-11.
[6] *Men.* V. 4. 6.
[7] *Curc.* V. 2. 17-21.
[8] *Ibid.* III. 31-4.

of a *Pactum Displicientiæ*, as in[1] "Dixit se redhibere si non placeat." Or as when the vendor's request for a return is refused in the words:[2]

> Sibi quisque ruri metit. Si male emptæ
> Forent, nobis has redhibere haud liceret.

Legal Procedure.—Legal procedure is also touched on by the dramatists; even the procedure before such minor magistrates as the Ædiles. The manner in which the Ædile exercised jurisdiction over the markets is hinted at in *Rudens* (II. 3. 42, 3):

> Novi: Neptunus ita solet. Quamvis fastidiosus
> Ædilis est: si quæ improbæ sunt merces, jactat omnes.

And in the *Captivi* (IV. 2), after a rehearsal of the shortcomings of fishmongers and butchers, and the suggestion of suitable punishments for them, we seem to have had the model of a good Ædile's opinions drawn, for Hegio exclaims, "Eugepæ! Edictiones ædilitias hic quidem habet."

The main burden of the administration of justice at Rome rested on the shoulders of the Prætor, whose chief duty was, as Livy says, "Jus in urbe dicere." We have an example of the Prætor exercising this function of *Jus Dicere* in the *Captivi* (IV. 3. 7). The parasite Ergasilus, in making his joke about giving relief to hams, that were "hanging uncondemned," by turning them into food, leads up to it by saying, "Nunc ibo ad meam præfecturam (*i.e.* the work of catering for an impending banquet) ut jus dicam larido." It was in the forum that the Prætor exercised his office,[3] "I ad forum, ad prætorum exquire." So in the *Pœnulus* (III. 2. 7. 8) we have a description of witnesses who are regular *habitués* of the public seats in the law courts, "Comitiales sunt meri; | ibi habitant, ibi eos conspicias quam prætorem sæpius." And in *Epidicus* (I. 1. 25. 6) we see the Prætor accompanied by the Lictors and the Fasces:

> *T.* At enim unum a prætura tua, Epidice, abest.
> *E.* Quidnam? *T.* Scies:
> Lictores duo, duo viminei fasces virgarum.

We find references to some of the judicial functions vested in him. He can conduct the ceremony of manumitting,[4] "Nunquam ad prætorem æque cursim curram ut emittar manu." It is the Prætor who arranges the form of procedure *in jure*. He regulates the "words of style" and the formal acts of the earlier stages of the *Legis Actio*. Then he leaves it to others to try the case and to pronounce the *Judicium*, which they must do in accordance with rules that have been laid down for them by himself. In Plautus we find this latter stage, the *Judicium*, clearly marked off from the preceding

[1] *Merc.* II. 3. 82-3.
[2] *Mostell.* III. 2. 112.
[3] *Persa*, IV. 3. 17.
[4] *Pseud.* 1. 3. 139.

one *in jure*,[1] "Aut ad populum aut in jure aut apud judicem res est." We find the conduct of trials entrusted, not only thus to a single private referee (*Judex* or *Arbiter*), but also to a group of Recuperatores. We, however, have no mention of a college or *Centumviri*; nor can we find any passage from which the existence of the *Decemviri Litibus Judicandis* can be inferred. These two institutions must have been waning in importance. The importance of the single *Judex* may have grown as that of these two colleges of judges decayed. We have[2] the desire for "Quemvis opulentum arbitrum." And we know that the *Lex Silia* and the *Lex Calpurnia*, which must have come into much activity by the time of Plautus, had greatly enlarged the range of actions triable by a single arbiter.

Judex and Arbiter.—In Plautus we have examples which show the *Judex* and the *Arbiter* standing with respect to each other in the same antithesis in which they are constantly to be found in the early legal sources. The special function of the *Arbiter* is to determine a dispute, not like the *Judex* by mere strict *Jus Quiritium*, but by considerations of moral fairness, which are applied by him in different ways so as to meet the countless combinations of circumstances which may be brought under his notice. Thus an *Arbiter* would be appointed in that *Legis Actio* called *Judicis Postulatio*, as on a bilateral contract, or any other personal claim where opposing equitable considerations had to be balanced. So in the prologue of the *Casina* (75-7) the speaker, to confirm his statement about the non-Roman custom of slaves marrying, says, "If it is not the case as I state, let some one wager me a jug of mead" ("Id ni fit, mecum pignus, si quis volt, dato | in urnam mulsi Pœnus dum judex siet"). Again[3] there is a reference to the *Lex Plœtoria*:

> Cedo, quicum habeam, judicem,
> Ni dolo malo instipulatus sis, nive etiamdum siem
> Quinque et viginti annos natus.

Chremes[4] mentions the case of an *Arbiter* being selected to decide a point of disputed boundaries, "Vicini nostri, hic ambigunt de finibus me cepere arbitrum." The delicate and elastic character of the intellectual task thus entrusted to an arbitrator is tersely brought out by Plautus in the antithesis between the opposing conceptions of *Certum* and *Arbitrarium*,[5] "Hoc quidem profecto certum est; non est arbitrarium." The repeated use by Plautus, though with an extra-judicial reference, of the term *Arbitratus* in the sense of "judgment with unshackled freedom" is noteworthy, as in the *Asinaria* (II. 2. 61), "Age, age, mansero | tuo arbitratu, val adeo usque dum peris." And in the *Rudens* (IV. III. 74-6) the fisherman tries to persuade Gripus that the wallet which he had fished up is a fish, but Trachalio says "Quoius *arbitratu* nos facere vis?" and Gripus adds, "Tu istunc (*i.e.* the wallet) hodie non feres, nisi das sequestrum aut arbitrum, | quoius hæc res

[1] *Men.* IV. 2. 20. [2] *Rudens*, III. 4. 8. [3] *Ibid.* V. 3. 24-6.
[4] Terence's *Heauton.* III. I. 89-91. [5] *Amphitruo*, I. I. 219.

arbitratu fiat." The non-judicial sense in which the word *arbiter* and its derivatives are thus used by Plautus is useful as furnishing a clue to the word's juridical meaning. It justifies the inference that the *arbiter* is a man who judges by the whole reality of the case as it presents itself to his mind, and that he has untrammelled discretion in estimating it, no restrictions having been imposed upon his investigations by the terms in which the prætor invested him with his duty. We gather this from such passages as[1] "Itaque æqui et justi hic eritis omnes arbitri," and[2] "Vin', qui in hac villa habitat ejus arbitratu fieri?"

The referee—whether *Judex* or *Arbiter*—receives also the further name of *Sequester* if he becomes by a magistrate's order the temporary depositary or bailee of the thing in dispute, for the purpose of handing it over to whichever litigant proves successful in the suit. We have an example of such a *Sequester*,[3] where Lysimachus says the woman Pascicompsa has been so entrusted to him—"Sequestro mihi data est."

For, after the outset of an *Actio in Rem*, when once the proceedings in dispute had been referred to an *Arbiter*, he might deem it needful to have the property in dispute produced. If so, it was consigned to his care, and he solemnly undertook to transfer it ultimately either to that one of the contending parties who up to that point had had the custody of it, or to his opponent, according as his judicial decision should be in favour of the one or of the other. So[4] Trachalio exclaims, with respect to the wallet about which there is a dispute:

> Tu istunc hodie non feres, nisi das sequestrum aut arbitrum
> Quoius hæc res arbitratu fiat.

And again:[5]

> Aut ad arbitrum reditur, aut sequestro ponitur.

And similarly:

> Vidulum hic adponite: ego servabo, quasi sequestro dedis, neutri reddibo,
> Donicum hæc dijudicata res erit.

But in the case of litigation between one peregrinus and another the *Judicium* was not entrusted to a single *Judex*, but to a group of *Recuperatores*. This gave an opportunity of bringing into the jury-box foreigners of different nationalities, and, moreover, of securing in quantity what might be lacking in the quality of their barbarian wisdom. A procurer laments,[6] "Quis me est mortalis miserior qui vivat alter hodie, | quem ad recuperatores modo damnavit Pleusidippus?" And in the *Bacchides* (II. 3. 36-8), where, although the scene is laid at the Piræus, Plautus depicts Roman legal customs:

> Postquam quidem prætor recuperatores dedit,
> Damnatus demum vi coactus reddidit
> Mille et ducentos Phillippum.

[1] *Amphitruo*, Prol. 16.
[2] *Rudens*, IV. 3. 107.
[3] *Merc.* IV. 3. 36.
[4] *Rudens*, IV. 3. 76-7.
[5] *Ibid.* 89.
[6] *Rudens*, V. 1. 1-3.

Legis Actiones.—In these matters of procedure the time of Plautus was a period of transition. The old order of the primitive *Legis Actiones* still continued dominant, but with a vitality due only to its ancestral reputation; for it had already disclosed its inadequacy to meet the fresh needs which had now grown out of the unanticipated social conditions developed by the period of the Punic wars. The new state of things made it needful for the tribunals to enlarge the methods of their procedure, if this could be done without too sudden and pronounced a break from the older order. Of such sturdy vitality was the system of *Legis Actiones* that we have good instances of its vigorous activity in the age of Cicero; and it was surviving to some extent, as we all know, even in the days of Gaius. In Plautus the frequency of the expression *Lege Agere* is noteworthy. Euclio, in reply to the cook's remark about himself that he had been hired *coctum non vapulandum*, says, "Lege agito mecum: molestus ne sis! I et cœnam coque."[1] So again,[2] "Lege agito; te nusquam mittam nisi das firmatam fidem."

But although the form of legal proceedings in vogue in our playwright's day is that of the old Legis Actiones, still we already detect some approaches towards the latter system which was destined to supersede them. Thus we twice read of "Scribere Dicam" as the summons by which an action was begun, thus,[3] "Iam quidem hercle te ad prætorem rapiam et tibi scribam dicam"; and[4] "Cras subscribam homini dicam." And if at this early date, anterior to the Lex Æbutia, we can find no quotation which indicates the existence of any *Formula* in the full technical juridical sense, still there is frequent use in Plautus of the phrase *Concepta Verba* and of the phrase *Jus jurandum conceptis verbis*. We have in the *Truculentus* (IV. 2. 57) "Conceptis, me non facturum, verbis jurem." In the *Bacchides* (IV. 8. 105-6), where Nicobulus is reading aloud his son's request for £200 to free him from the evil consequences which may result from his intrigue with an officer's wife, we find:

> Ego jusjurandum verbis conceptis dedi,
> Daturum id me hodie mulieri ante vesperum,
> Priusquam a me abiret.

And in the *Cistellaria* (I. 1. 99, 100) Sileniam, talking over her abandonment by her lover, exclaims:

> At ille conceptis juravit verbis apud matrem meam,
> Me uxorem ducturum esse. Ei nunc alia ducenda est domum.

In the *Mercator* (IV. 4. 48-51) Lysimachus, trying to appease his incensed wife, says in self-exculpation:

> Uxor, obsecro.
> Conceptis verbis jam jusjurandum dabo,
> Me nunquam quidquam cum illa? . . . Iamne abiit Syra?

[1] *Aul.* III. 3. 10.
[2] *Mil. Glor.* II. V. 43.
[3] *Aulul.* IV. 10. 33.
[4] *Pœn.* III. 6. 5.

In the *Pseudolus* (I. 3. 133-5) we find Calidorus remonstrating with the procurer for having sold the coveted mistress to another of her lovers:

Calidorus. Juravistin, te illam nulli venditurum, nisi mihi?
Ballio. Fateor. *Ca.* Nempe conceptis verbis. *Ba.* Etiam consultis quoque.
Ca. Perjuravisti sceleste!

Doubtless he had used the formula, "Ex animi mei sententia juro." Plautus mentions also the *stipulato conceptis verbis*,[1] "Nullum periculum est, quod sciam, stipularier. | Ut concepisti verba . . ."

In Jus Vocatio.—After having endeavoured thus to summarise the hints furnished by Plautus as to the legal procedure of his times, let us see by what means and under what forms preparation for that procedure is made by his litigants. For the plaintiff must bring the defendant before the magistrate. Wherever the latter is met by the former, the plaintiff can put into effect the *In Jus Vocatio*, and tell the defendant to follow him to court. There the plaintiff will set forth in his presence his grounds of his action, which may, of course, proceed thenceforward in any of the various forms which we have discussed. Some of the passages bearing on the *In Jus Vocatio* will help to make clear the character and the importance of this step. We find[2] "In jus voco te," followed by the prompt reply, "Non eo." And similarly,[3] "Ambula in jus," "Non eo." To which the litigant rejoins, "Licet antestari?" *i.e.* shall I call upon the bystanders to take notice that I have summoned you? And we have in the *Persa* (IV. 9. 8, 9) a spirited colloquy:

S. Age, ambula in jus, leno. *D.* Quid me in jus vocas?
S. Illi apud prætorem dicam: sed ego in jus voco.
D. Nonne antestaris? *S.* Tuan' ego caussa, cornufex,
Quoiquam mortali libero aures atteram
Qui hic commercaris cives homines liberos.
D. Sine dicam. *S.* Nolo. *D.* Audi. *S.* Sum surdus, ambula.[4]

Terence, too, gives us examples of summoning the defendant before the prætor, thus:[5] "Si vim faciet, in jus ducito hominem." In the *Phormio* (I. 2. 77) Geta's remark, "Ego te cognatum dicam, et tibi scribam Dicam"—and again (II. 2. 15) the "En unquam injuriarum audisti mihi scriptam dicam," seem to point to the written procedure of the later period. It is clear from our quotations that it was not needful to set forth the cause of action in the *In Jus Vocatio*. It was possible to arrange for adjournments by a *Vadimonium*, a contract between defendant and plaintiff which amounted to a *Promissio Judicio Sisti*. Thus:[6] "Homo ad prætorem plorabundus devenit, | infit ibi postulare, plorans, ejulans, | ut sibi liceret milvom vadarier.'

[1] *Pseudolus*, IV. 6. 14-5.
[2] *Asin.* II. 4. 74.
[3] *Curc.* V. 2. 22, 7.
[4] See similarly *Rud.* III. 1. 16; *Truc.* IV. 3. 66.
[5] *Eun.* IV. 6. 30.
[6] *Aulul.* II. 4. 37-40.

And[1] we find, "Utinam vades desint, in carcere ut sis." And in the *Curculio* (I. 3. 5-7) the girl Planesium, looking about, says:

> Ubi tu es qui me vadatus es Veneris vadimoniis?
> Ubi tu es qui me libello Veneris citavisti? ecce me!
> Sisto ego tibi me et mihi contra itidem ted ut sistas suadeo.

And Phædromus, coming forward, replies, "Adsum: nam si absim, haud recusem quin mihi male sit, mel meum." The passage may remind us of the remark of the witnesses of Jessica's elopement—

> Ten times faster Venus' pigeons fly
> To seal love's bonds new made than they are wont
> To keep *obliged faith* unforfeited.

But there are some noteworthy passages in the plays where it is rendered impossible to make an *In Jus Vocatio*, by the debtor's going off to obtain naturalisation in a foreign land and so withdrawing beyond the reach of his creditor, being of those "qui exilii causa solem vertunt." Thus:[2] "Ne trapezita exulatum abierit argentum ut petam." And[3]

> Faceres quod partim faciunt argentarii!
> Ubi quid credideris, citius extemplo a foro
> Fugiunt, quam ex porta quom emissust lepus.

Course of the Trial.—We do not of course gather much light from the dramatists as to the minute details which marked the course of the trial: as, for instance, the *Sacramentum* in a *Legis Actio*. But there are certain passages which refer to the stage of *Rei Vindicatio* in it. Thus[4]

> *G.* Nescio, neque ego istas vostras leges urbanes scio.
> Nisi quia hunc meum esse dico.
> *T.* Et ego item esse aio meum.

And other passages refer to the *vindicatio in libertatem*:[5] "Promisistin', si liberali quisquam hanc adsereret manu, | te omne argentum redditurum?" And again,[6] "An festuca facta e serva libera est?" And[7] "Eas liberali jam adseres causa manu."

The extant portions of Plautus throw no light on the forms in the Legis Actio of *Judicis Postulatio*: although there are the expressions *Capere Judicem*[8] and *Capere Arbitrum*.[9]

The litigation, after passing through the stage of the *Judicium*, gives occasion either to a condemnation[10] or to a judgment for the defendant.

[1] *Persa*, II. 4. 17, 8.
[2] *Curc.* IV. 4. 3.
[3] *Persa*, III. 3. 30.
[4] *Rud.* 85. 6.
[5] *Curc.* V. 3. 31-2.
[6] *Mil. Glor.* IV. 1. 15.
[7] *Pœn.* V. 2. 4.
[8] *Mostell*, III. I. 20. 1.
[9] *Truc.* II. 3. 68.
[10] There is a reference to a *Condemnatio Penalis* in *Capt.* III. I. 16.

"Nisi istum condemnavero,"[1] and[2] "Hodie ego peregrinos absolvam, cras agam cum civibus." With respect to the forms of execution by which the fruits of litigation might be exacted, the only references in Plautus to any *Manus Injectio* do not refer to the *Legis Actio* which lay against certain men bound by a civil debt (*i.e.* a *Confessus* and a *Judicatus*), but to that other *Manus Injectio* which enforced criminal penalties. Thus in the *Persa* (I. 2. 16-20) a man prefers the occupation of a parasite to that of an informer; he prefers that of the parasite for this reason:

Sed legirupam ni damnet, det in publicum
Dimidium. Atque etiam in ea lege adscribitor:
Ubi quadruplator quempiam injexit manum,
Tantidem ille illi rursus injiciat manum et æqua parti prodeant ad tresviros.
Et æqua parti prodeant ad Tresviros.

So again,[3] "Postidea ego in te manum injiciam quadrupli venefica," the penalty for fraud being sometimes fourfold. An actual "distress" or extra-judicial execution by *Pignoris Capio* was permitted for certain obligations.[4] This extra-judicial process, though not an actual lawsuit, was yet so dignified by its forms as to be entitled a *Legis Actio*. It is found in Plautus in two noteworthy instances. Both refer to the soldier's *Æs Militare* (we have no reference to his similar *Pignoris Capio* for the *Æs Equestre* or the *Hordearium*). Megadorus,[5] after enlarging on the extravagance of a wife who has brought a dowry, says:

Ubi nugivendis res soluta est omnibus
Pro illis crocotis, strophiis, sumto uxorio:
Ibi ad postremum cedit miles—æs petit.
Itur, putatur ratio cum argentario;
Impransus miles adstat, æs censet dari.
Ubi disputata est ratio cum argentario,
Etiam plus ipsus debet argentario.
Spes prorogata militi in alium diem.

Miles in this quotation may mean either the soldier who claims the *Æs Militare*, or else he who acts for a Publicanus by putting in a *Pignoris Capio* for an overdue *Vectigal*. Gains says that, whilst the military *Pignoris Capio* arose by custom, the fiscal *Pignoris Capio* arose by a *Lex "oria"*; (the partly illegible name is read by recent editors as "Censoria").

Anthemonides,[6] soliloquising on being deceived by the procurer after having made him a payment, says:

Ubi nec leno neque illæ redeunt, nec, quod edim, quidquam datur.
Pro majore parte prandii pignus cepi, abii foras.
Sic dedero! Ære militari tetigero lenunculum.

But little else of the steps of legal procedure can be traced in the dramatists. Yet in the *Eunuchus* of Terence (II. 3. 28-9) in the words

[1] *Rud.* V. 3. 27.
[2] *Pseud.* IV. 7. 133.
[3] *Truc.* 4. 2. 50.
[4] See Gaius, IV. 29.
[5] *Aulul.* III. 5. 51-7.
[6] *Poen.* V. 5. 5-7.

"Hanc tu mihi, *vel vi, vel clam, vel precario* | fac tradas," we have an allusion to the prætor's edict. And in the *Phormio* of Terence (II. 4. 10-12) we have an allusion to the *Restitutio in Integrum*:

> Quod te absente hic filius
> Egit, restitui in integrum æquum est ac bonum,
> Et id impetrabis.

The *Beneficium Competentiæ*, which enabled a defendant to pay only so much of a debt as he conveniently could, is referred to, in a rudimentary form, in *Pseud.* (V. 2. 23), "Non audes, quæso, aliquam partem mihi gratiam facere hinc argenti?"

Attorneys.—A little should be said about the employment of representatives ("Attorneys") in litigation. The ancient principle which excluded representation by agents held still as a rule in the days of Plautus, although there may already be noticed a faint beginning of the conception of a *Procurator*—a beginning which links itself to the revolution which at that juncture was beginning to pass over the whole organisation of litigious procedure. But the employment of assistants had already become very common, whether by clients invoking their patrons, or by kinsfolk and friends invoking kinsfolk and friends. Their assistance, according to traditional rule, is given without fee. Thus,[1] "Ego censeo eum etiam hominem aut in senatu dare operam aut clientibus." So again,[2] "Adsto advocatus quoidam cognato meo," and[3] "Res magna amici apud forum agitur: ei volo | ire advocatus," and "Non equidem mihi te advocatum, pater adduxi, sed viro. | Hinc stas, illinc causam dicis,"[4] and[5] "Verum tamen ibo, ei advocatus ut siem."

Moreover, side by side with this, we find a development of the idea of hired professional *Advocati* who are called to the succour of those who wish to get the better of their opponents by quibbles and juridical subtleties. Not only do they plead the cases of their clients but, before taking legal proceedings in court, they suggest the best manner of conducting those proceedings, the proper way of drawing out the proofs in favour of the clients, and, in short, the whole course to be taken for ensuring a verdict. Nay, they even lend themselves as *Testes Vocati* to give evidence to facts which their clients (who pay them) need to have proved against the opponent. When Blepharo[6] sees identical scars on two men's right arms, and when Amphitruo entreats him in the words "Blepharo, quæso, ut advocatus mi adsis neve abeas," Blepharo replies, "Quid opust me advocato, qui utri sim advocatus nescio?" So again,[7] "Ego hos duco advocatos, homines spissigradissumos." And[8] "Hodie juris coctiores non sunt, qui lites creant, quam hi sunt, qui, si nihil est quicum litigent, lites emunt." And (18. 9) "Ergo nos inspicere oportet istuc aurum, Agorastocles ut sciamus quid dicamus mox pro testimonio."

[1] *Asin.* V. 2. 20-1. [2] *Cas.* III. 3. 5. [3] *Epid.* III. 3. 41-2. [4] *Men.* V. 2. 47. [5] *Rud.* III. 2. 25. [6] *Amph.* IV. 3, 4. [7] *Pœn.* III. I. 3 [8] *Ibid.* 2. 10.

But slaves, although they could be poets and teachers of literature, might not practise in court, as we see from the *Phormio* (II. I. 62), "Servum hominem causam orare leges non sinunt."

Evidence.—Beyond the instance of the *Testes Advocati* we find in the comedies of Plautus some passages that bear on evidence in general as a means of proof in litigation. Very striking is the special importance already attached, more markedly than in modern Continental law, to first-hand witnesses, those who have actually themselves seen or heard that of which they give evidence. Thus,[1] "Pluris est oculatus testis unus quam auriti decem." Some we know were shut out from being witnesses, "Semper curato ne sis intestabilis."[2] Thus slaves are essentially incompetent to give evidence.[3] "Servom antestari? Vide!" Their evidence could only be received when confirmed by torture. Although neither Gaius nor Justinian says anything in their Institutes about the torturing of slaves, there is in the *Pandects* (XLVIII. 18) an entire Title de quæstionibus.

In the *Phormio* (II. 3. 56-9) we have a reference to the legal axiom as to *Res judicata*:

> Magistratus adi,
> Judicium de eadem causa iterum ne reddant tibi.

For let the matter once be decided, and then it is admitted that it cannot form the subject-matter of fresh litigation; thus,[4] "Actam rem ago," and[5] "Iterum ille eam rem judicatam judicat."

Our review will, at any rate, have served to show that even an ancient playwright may reveal, though not perhaps with the accuracy of the camera, how law touches the affairs of his actors as they move on a stage where every-day life is depicted. We have law in its vital and veritable vigour we have that collision of interests and of wrong-doings by which its activity is elicited—the material of the whole being drawn from real life. Thus, when we read Plautus, we may trace from his characters, as they express the sentiments current in their day, the outline of a dawning conception of the natural—as opposed to the technical civil—family, and the new influence thus brought to bear on successions, as shown in the growing opposition of the claims of the *Cognati* to those of the *Agnati*. But Plautus is still more rich, as we have seen, in examples that show the actual legal conditions of family life both from the conjugal and the parental points of view, and that throw light on the condition of the slave in the eye of law. It would be futile to read into Plautus more than clearly be found there; but the clues which he affords to the legal conceptions of his contemporaries are highly suggestive, and by them we may, as it were, recall into poetic but still actual life something of the law and custom of the Republic in the age of the Punic Wars.

[1] *Truc.* II. 6. 9.
[2] *Curc.* I. 1. 30.
[3] *Ibid.* V. 2. 25.
[4] *Astell.* IV. 2. 36.
[5] *Rud.* Prol. 19.

THE INTERNATIONAL LAW OF BILLS AND NOTES.

[*Contributed by* Sir M. D. Chalmers, K.C.B., C.S.I.]

Hague Conferences.—In 1910 the Hague International Conference on the law of Bills of Exchange and Promissory Notes met under the presidency of M. Asser, the well-known Netherlands international lawyer. Thirty-eight nations were officially represented. The sittings of the Conference lasted about seven weeks, and as the result a draft code was prepared for submission to the Governments concerned.

The Conference of 1912 brought the labours of the previous Conference to a successful issue. The draft code was three times re-considered, and was eventually approved, and supplemented by a Convention for bringing it into force. The original text of the code and Convention is in French. These documents, with an English translation, and a detailed memorandum by the British delegates, Mr. F. Huth-Jackson and myself, have been published by the Foreign Office as a Parliamentary paper.[1]

Convention of 1912.—The terms of the Convention require the contracting nations to accept the code in its entirety, subject to certain specified provisions, which may be supplemented or varied by national legislation. Two changes were made at the last stage. In the first place, the title of the code was changed from "Uniform Law on Bills and Notes" to "Uniform Regulations on Bills and Notes," to meet the wishes of one or two States, which were of opinion that the code could be introduced into their territories as a treaty obligation without the necessity of formal legislation. In the second place, provision was made that a State might adopt the code so far as relating to bills of exchange, without adopting the part relating to promissory notes. This amendment was introduced to meet the wishes of Russia, where bills of exchange are not in common use, but promissory notes are the main negotiable instruments. Any sudden change in the law relating to notes would, it was said, produce widespread confusion. It is specially provided by the Convention that the permitted variations of the code are not to interfere with the numbering of the articles.

Parties to the Convention.—The following States have already become parties to the Convention, and have thereby undertaken to introduce the new code into their territories and dependencies, viz. Argentina, Austria-Hungary,

[1] Commercial, 1913, Cd. 6680.

Belgium, Brazil, Bulgaria, Chile, China, Denmark, France, Germany, Greece, Holland, Italy, Japan, Luxembourg, Mexico, Montenegro, Norway, Nicaragua, Paraguay, Portugal, Roumania, Russia, Salvador, Siam, Spain, Sweden, Switzerland, and Turkey. The Convention provides for future adoption of the code by other States on due notice being given to the Netherlands Government.

Position of England and the United States.—England and the United States were unable to sign the Convention, and held out no hope that they could ever become parties to the new code. But they warmly approved the project of a uniform law for those countries which were able to accept it, and gave all the assistance they could by taking part in the debates on the details of the new law, and suggesting amendments which would assimilate its provisions to those of the Anglo-American system, where this seemed practicable. The reasons why England and the United States held aloof are these. We have at present a practically uniform system of exchange law throughout the English-speaking world, founded on the English common law. As the English delegates said in the Conference, "It is no question of national pride or obstinacy which has given rise to this attitude, but the necessity of safe-guarding the interests of our mercantile commerce. A law which governs more than 130,000,000 people, including the United Kingdom, the British colonies, and most of the States of the United States of America—without counting the vast population of the Indian Empire—cannot be seriously modified without disturbing long-settled commercial relations, and without creating divergencies in legislation among the members of the Anglo-Saxon family. It is possible that among the rules of English law there are some which are antiquated and inconvenient, but in its main lines our law does but incorporate the usages of our commerce. It is not an arbitrary law imposed by the legislature on the commercial community. The legislature has but given the sanction of law to the usages of our commerce and industry."

Mr. C. A. Conant, the United States delegate, took up the same position. "There is great reluctance in America," he said, "to undo the long and arduous work which has brought about uniformity in thirty-five American States, four territories, and in Great Britain and her dependencies. The scope and policy of American laws differ in some respects from the system of the countries of the Continent. We have no code of commerce distinct from the common law; we recognise no distinction between merchants and others who draw bills or sign notes, and we have no separate tribunals for dealing with commercial cases." He then went on to point out that commercial laws were within the competence of the State legislatures, and could not be dealt with by Congress or the Federal Government. Having regard to this condition of affairs, it would be a very dangerous experiment to do anything which would put the Anglo-American system out of gear. If any constituent member of the system were to break away from it, it would require the

harmonious action of more than fifty democratic legislatures to again restore uniformity.

Uniformity of Law.—But though the English-speaking communities cannot accept the new code, its adoption by other countries will be of world-wide advantage. Instead of some forty diverging codes, the exchange law of the commercial world will hereafter be reduced into two great systems. Moreover the new Uniform Regulation, though in many respects differing from the Anglo-American system, is less divergent than any existing continental code. Exchange law will be much more accessible, and the occasions of conflict will be greatly reduced.

Proposed Amendments of English Law.—With a view to still further reducing the occasions of conflict, the British delegates have submitted for consideration certain amendments in our law which seem desirable on their intrinsic merits, and which will not interfere with the essentials of the Anglo-American system. Some of them are hardly more than drafting or declaratory amendments, but there are two excrescences in English law which sadly require pruning off. The first is the rule which draws a distinction between common law and statutory holidays. If a bill, according to its tenour, falls due on a common law holiday it is payable on the previous business day, while if it falls due on a Bank holiday it is payable on the succeeding business day. No other country has ever thought of adopting any such rule, and in practice it often leads to confusion and mistakes. It was proposed to get rid of it when the Bills of Exchange Act, 1882, was under consideration, but the bankers then opposed any change. They said that when Sunday was followed by a Bank holiday it was convenient to have the maturity of some bills thrown forward while that of others was thrown back, so as to avoid too great a press of work on the Tuesday. But now that Saturday is universally recognised as a short day, this argument has lost its weight, and it is to be hoped that this anomaly will be removed. The confusion is increased by the fact that the days fixed as Bank holidays differ in different parts of the United Kingdom.

Days of Grace.—The second excrescence is the rule relating to days of grace. The foreign delegates at the Hague were unanimous in their condemnation of this fictitious method of calculating the maturity of a bill or note, and the English and American delegates could say nothing in its favour. The Continental nations have all long ago abolished days of grace. They are retained only by England and some of her colonies, and, I think, two States of the United States. When the Bills of Exchange Act was under consideration it was proposed to abolish them. The Institute of Bankers had passed a unanimous resolution in favour of their abolition, and merchants generally were of the same opinion. But when the necessary amendment was moved in the Commons Committee, the objection was raised that in certain trades small tradesmen were in the habit of accepting bills payable a month after date to pay for goods supplied by wholesale

houses, and if days of grace were abolished they would lose three days' credit. To this the reply was made that if it was intended to give thirty-three days' credit, the simple plan was to draw the bills payable thirty-three days after date. The answer given was that the small tradesmen would never understand this. At that time the small tradesman's vote was more important than it is now. The philanthropists were obdurate, and if the amendment had been pressed it would have imperilled the passage of the Bill.

Operation of the New Code.—Under the convention for bringing the new code into force the time for adhesion and signature was extended till July 31, 1913. Any State desiring to come in after that date would have to comply with certain additional formalities. That time has now elapsed, but we have no information at present as to the time when the code will be brought into actual operation in the different contracting States. With one or two exceptions confirming legislation will be required, and each State will have to consider its attitude to the reserved points where variation from the provisions of the code is permitted. I was in Russia the other day, and made inquiry as to what was doing there. M. Davydoff, of the Ministry of Finance, told me he thought it would be more than two years before the new code could be brought into actual operation. At present it is being studied by a special commission, and time must be given to the mercantile community to make themselves acquainted with its provisions in their complete form. The lawyers are somewhat divided on the question whether the code can be brought into operation by executive order as a treaty obligation, or whether confirming legislation is requisite. The balance of opinion is in favour of the latter view.

Proposed Uniform Law of Cheques.—After the Uniform Regulation as to Bills and Notes had been practically settled, the Conference of 1912 proceeded to consider the question of a uniform law for cheques, and a draft code in the form of a series of resolutions was prepared for submission to the Governments represented at the Conference. When this draft has been considered and reported on, a further Conference is proposed, which will meet at the Hague in the summer either of 1914 or 1915. At this Conference the death of Mr. Asser will be deeply felt. He presided with conspicuous tact and ability over the Conferences of 1910 and 1912. The holding of those Conferences was largely due to his initiative, and their successful issue was due in no small measure to his enthusiastic advocacy of international codification.

A PLEA FOR CONSULAR CONVENTIONS.

[*Contributed by* Baron A. Heyking, D.C.L.]

As a result of the ever-rising tide of international trade, commerce, finance, and other business relations, the need for a closer understanding between local authorities and foreign Consular Officers is constantly growing. In the present state of civilisation and culture each nationality is more and more merging its individuality in the universal life of civilised mankind. This tendency towards the development of international intercourse has enhanced the importance of the Consular service. Only a hundred years ago nearly all Consular Officers were honorary, not State, officials, while, at the present time, the Great Powers are served, at the important centres of commerce and navigation, by professional Consuls the range of whose duties is as great as it is varied.

Legal Status of Consuls.—The growing complexity and importance of Consular duties has made it necessary to define the legal status of Consular Officers at their place of residence and to regulate their mutual relations with the local authorities in a more explicit and precise form than is done by the "Exequatur"—the ordinary form of recognition of the official character of the Consular Officer by the local Government. On the Continent this has been arranged in a satisfactory manner by a series of treaties concluded for the purpose of assuring to Consular Officers a satisfactory legal position, which enables them to transact their public business with due efficiency. Great Britain alone has lagged behind in this movement and has, up to the present, left the Consular status and the definition of the competency of foreign Consuls in the British Empire in a position which no longer satisfies the modern requirements of international intercourse. To instance Russia, the whole range of the duties of Russian Consular Officers in Great Britain is regulated solely [1] by the provisions of the Treaty of Commerce and Navigation concluded on January 12, 1859, under which the Consuls of the two contracting Powers enjoy the "powers and privileges, exemptions and immunities of the Consuls of the most-favoured nations." This most-favoured-nation clause enables British Consular Officers in Russia to enjoy all the rights and privileges accorded by Russia in the Consular Conventions con-

[1] With the exception of the declaration agreed upon in London August 9, 1880, by Great Britain and Russia about estate left by sailors on board ships of their nationality.

cluded by her with France on April 1, 1874, with Germany on December 8, 1874, with Italy on April 28, 1875, and with Spain on February 23, 1876, while in England this clause has hardly any practical importance whatever for foreign Consuls. According to a Memorandum[1] of the Chief Secretary's Office at Adelaide, dated August 8, 1906, the Secretary of State for the Colonies, after communication with the Secretary of State for Foreign Affairs, laid down under date June 9, 1906, the principles that foreign Consuls in England were treated like any other foreigners resident in England and were not visitors of the Court; that there were no privileges to which foreign Consuls were strictly or legally entitled; that the law could hardly be said to recognise them in their official character; that no difference should be made in treatment between professional Consuls (Consuls de carrière) and other Consular Officers; that it would be in the highest degree inconvenient if, in British Colonies, Consuls of foreign powers were permitted to acquire a claim to the privileges or immunities of diplomatic agents; and that foreign Consuls were not to be permitted to approach the local Government with representations on general political questions. The Memorandum above quoted requires comment, in order to bring out the different points involved. No one intends to claim for Consular Officers the privilege of exterritoriality which is accorded to diplomatic representatives, and nobody questions that representations on general political matters are altogether outside the province of Consular Officers. As a matter of fact, in those countries which have concluded Consular Conventions and in which the position of Consular representatives is quite satisfactory, they are not entitled to exterritorial rights and are not at liberty to engage in questions of general politics. The reasons which should induce the English Government to conclude Consular Conventions lie therefore in quite another direction.

The Duties of Consuls.—International relations are based on the principle of reciprocity. From the point of view of that principle it does not seem right that the foreign Consuls who reside in the British Empire should not enjoy, in their places of residence, the rights and privileges which are necessary for successfully and efficiently carrying out their duties, while English Consuls abroad are in full possession of such rights. Moreover, not only the foreign Consuls but also the British authorities would find it useful and advantageous that the Consular service should have a better and more efficient standing than has been the case in Great Britain heretofore. The fact ought not to be lost sight of that Consular Officers, albeit they are foreign representatives, are, at the same time, local officials and are ever ready, not only to assist their own countrymen, but also to co-operate with the local authorities. In their capacity of official residents of the country, not for private purposes but by appointment of their own Government and by the

[1] Published in New Zealand under date October 1, 1906, in *Gazette* of October 4, 1906, p. 2608; in South Australia under date August 6, 1906, in the *Gazette* of August 9, 1906, pp. 282-3, and in the *Gazettes* of other Australian States.

express consent of the local Government, they need a special legal status distinguishing them from private persons. Foreign Consular Officers are expected to act for the benefit, not only of their own countrymen, but also of those local residents and authorities who apply to them. Having no administrative and executive power whatever and no status defined by law they find themselves in a somewhat constrained position, which prevents them carrying out their mission and work in a satisfactory manner. Consular Officers are, as a matter of fact, in the transaction of their public business, local officials. It is therefore not only desirable but it stands to reason that their official character should be recognised in all cases where they are approached officially.

Consular Jurisdiction over Seamen.—In their jurisdiction over the seamen serving on board merchant vessels of his nationality, Consular Officers in Great Britain do not always find themselves at liberty to apply their rules and regulations. It is a provision of international law which has been expressed in the treaties of all civilised nations, that it is the Consul's right and duty to inquire into all differences and disputes between captains and their crews so long as they relate to questions of the internal discipline of the vessels. Only when the disorder is of a character to interfere with the public peace or where another person, not a member of the crew, is implicated in it, are the local authorities entitled to interfere. This rule is not yet sufficiently recognised in Great Britain. There have been cases in which magistrates in Great Britain have regarded themselves as competent to interfere between captains of vessels of foreign nationality and their crews in matters of discipline and wages. It is difficult to understand how a British judicial functionary who is ordinarily ignorant of the rules and regulations under which foreign ships' articles are signed can be competent to adjudicate on questions which turn wholly on those rules and regulations. British Courts have gone so far as to take upon themselves to decide in case of disputes between foreign sailors about wages and ship's discipline that the application of the foreign law is not in itself compulsory in Great Britain. In one case of a dispute as to the payment of wages and of other differences of a disciplinary nature on board a German vessel, the *Johannes Christoff*, which was then lying in a British port,[1] it was decided that the foreign law should not be applied if the Court were of opinion that it did not correspond with the rules of British justice. In this way British Law Courts have regarded themselves not only competent to settle disputes which, according to international law, are ordinarily exempt from territorial jurisdiction, but even at liberty, in such cases, to decide whether the laws of the foreign country concerned should be applied as being in accordance with justice and, if they think that is not the case, to correct them in accordance with their own views. In face of this rather extraordinary mode of procedure, it is fair to mention, in order to do justice to

[1] "Streitige Gerichtsbarkeit Fremder Konsuln in Zivilisirten Landern," in the Journal *Zeitschrift für internationales Privat und Strafrecht*, 1881, vol. i.

the practical commonsense of Englishmen, that British authorities, as a rule, are aware of the fact that the Consular Officer of the nationality to which the ship belongs is more fit than are the local Law Courts to give judgment in disputes about wages and discipline through his knowledge of the language and of the maritime laws of his nation. Nevertheless, the theoretical weakness of the legal position remains, and it may not be altogether superfluous to point out that, according to the generally recognised principle of international law, a contract, concluded in observance of the laws of the land where it is made, is valid, not only in that land, but everywhere else. It is therefore irrelevant whether the contracting parties remain in the State where the contract was lawfully concluded or whether they happen to enter the territory of another State.

Articles signed in Russia by the crew of a Russian vessel cannot lose their validity through the ship being in a port of the United Kingdom. It was nothing short of a violation of international law that a Scottish Sheriff arrested a Russian ship on behalf of certain of her crew who, having deserted, claimed wages which they had forfeited by their action.[1] It would seem, therefore, to be in the interests of international shipping that Great Britain should renounce the obsolete pretension to the right of interfering at her pleasure in the internal affairs of foreign ships and should leave it to the foreign Consular Officers concerned to deal with such matters, recognising them as the only competent judges in all that relates to the discipline and internal economy of the ships of their nationality in accordance with international law. The adoption of such a course by Great Britain would be the more advisable, as British Law Courts regard cases of desertion from foreign ships as not coming within their jurisdiction. If the breach of the internal order of a foreign ship by desertion is considered ontside the competency of the local courts of justice, it would be only consistent that all cases connected with that order should be treated similarly.

Proposed Consular Conventions with Great Britain.—The reasons which have induced the Continental powers of Europe to regulate by mutual agreement the legal status of their Consular Officers apply equally to this country. It is obvious that it would be to the advantage of both sides to strengthen the official position of foreign Consular Officers in Great Britain. The old principle of absolute territorial sovereignty, which does not admit of the exercise, in any form, of the jurisdiction of a foreign State within the limits of the home State, has become incompatible with the requirements of modern intercourse amongst civilised nations. Great Britain has already infringed the principle of absolute sovereignty by the Statute of Queen Anne of 1709,[2] which assures to foreign diplomats the unlimited exercise of their duties by granting them the privilege of exterritoriality. She was induced to do so by

[1] The particulars of this case are quoted at length in Baron A. Heyking's *Practical Guide for Russian Consular Officers* (Eyre & Spottiswoode, London, 1904), § 268.

[2] 7 Anne c. 12.

the requirements of the international community of the civilised States of the world. The same reason calls for the recognition, by international agreement, of a Consular legal status. Of course it would hardly be possible to grant such privileges to Consular Officers who are the subjects of the State in which they fulfil their functions. A Consular State Treaty which would determine the competency of foreign Consuls and formulate their legal status would therefore not introduce a new principle in the Consular regulations of Great Britain with other States, but would only make the Consuls better able to serve the interests of their own nationality as well as those of the place of their residence. The Consular Conventions which it is suggested should be concluded between Great Britain and other States should incorporate the stipulations of the like Consular Conventions concluded by Russia with France, Germany, Italy and with Spain[1] with the exception of those stipulations referring to navigation.

Definition of Consular Status.—The Consular status defined in these Conventions is stated therein as follows: Professional Consuls (Consuls de carrière) can neither be arrested nor put in prison except for deeds which, according to local law, are triable by jury. If required to give evidence in Courts of Law, they must be invited to attend by an official letter from the local tribunal, not by the customary summons to appear on pain of punishment, and they may excuse themselves, on the ground of Consular business, from such attendance in civil causes, and in such cases the local authorities must send to the Consul to take his verbal deposition, or to have the same reduced to writing. The Consular archives are exempt from the power of the local authorities, who cannot, under any pretext, either seize or inspect them. Professional Consuls (Consuls de carrière) are exempt from any obligation to furnish quarters for the military or to pay military contributions, and are free from payment of house duties and direct taxes on personal estate or luxuries imposed by the State or local communal authorities, unless they possess real estate in the country. In the latter case they pay the usual taxes as private persons, so far as such real estate is concerned, and are subject to the same legal procedure as the landowners who are natives of the country, *i.e.* they must pay all taxes which are borne by native landowners on the property they own. Consuls have the right, in the exercise of the powers which are conferred upon them, to address to the authorities of their Consular districts protests against the infraction of treaties or conventions existing between their own country and the State in which they reside, against any abuse or injustice to which the State they represent may have been subjected. If their claim be ignored, they may have recourse, in the absence of a diplomatic official of their own country, to the Government of the State in which they reside. In cases of this nature, Consular Officers are entitled to enter their protest directly, either in a Court of Law or with the responsible State officials, and do not need to follow the customary modes of procedure

[1] See *supra*, p. 575.

or to be represented by lawyers or attorneys. Therefore the Consul has, in the course of his official duties, the right to maintain his official character even in Courts of Law and before the organs of administration. The Consul must be notified by the local authorities whenever the police or the Custom House officials intend to visit a Russian ship, in order that he may have the opportunity of being present. The aforesaid treaties also give the Consular Officers of the contracting parties the right to act as notaries public: (*a*) In case of deeds concluded between their countrymen on the one hand and local subjects on the other; (*b*) in cases of deeds concluded between local subjects, if such deeds have for their exclusive object property situated in the territory of the country which they represent or if they relate to affairs which are to be dealt with in that country. Consular Officers are further empowered by these treaties to certify the validity of documents issued in Russia for the purposes of local authorities. All such documents when properly attested by Consular Officers and sealed with the official seal, possess the same validity and force in the territory of the contracting powers as they would have if they had been drawn up in either country by notaries or other officially competent persons.

Confirmation of Existing Privileges.—The stipulations as above have proved in other States to be satisfactory, assuring to the Consular Service that efficiency which must be its chief aim. It can be safely assumed that the same stipulations would prove satisfactory also in Great Britain, not interfering with the territorial sovereignty and giving to the foreign Consular Officers the possibility of carrying out their mission and of being of assistance to local authorities in a more complete and satisfactory way than has been the case hitherto. Many of these stipulations have already been recognised in Great Britain. It is now only necessary to codify them and to bring them from the state of sporadic and casual observance into the more satisfactory position of express acknowledgment by the State authorities once for all. For instance, foreign Consular Officers in Great Britain do not pay Income Tax and House Duty by courtesy. There have been cases when Consular Officers, being in Court for giving assistance to judges, have been allowed to be seated on the Bench. Consular jurisdiction in the matters of discipline and internal order on board the ships of their nationality is ordinarily not interfered with by local authorities. Foreign Consular Officers in England have in many cases acted as notaries public in legalising deeds concluded between local subjects which have for their object property situated in the territory of the country, which they represent according to the rule "lex rei sitæ." The inviolability of the Consular archives being considered outside the power of the local authorities has in England already been practically recognised in many cases. It is therefore possible to say that the conclusion of a Consular convention, on the lines as proposed, would not create altogether a *novum*, but rather recognise a state of affairs which is already in existence. It is patent to everybody that such a special recognition by State conventions has

the advantage of fostering the co-operation between foreign Consuls with the local authorities, avoiding possible friction, and introducing stability in international intercourse. England is at present undergoing an evolution from her previous state of splendid insular isolation towards a closer touch with Continental powers and the recognition of Continental usages. These considerations make it possible to assume that Great Britain will not remain refractory to the exigencies of the practical Consular Service.

Consuls as Jurors.—In addition to the stipulations quoted above the case of foreign Consular Officers in England requires another provision which should be mentioned in Consular Conventions for safeguarding the efficiency of Consular work. Foreign State Consular Officers have been sometimes called upon in England to serve as jurors, and as in the Juries Act of 1870 officers of foreign States are not mentioned among the persons who are exempt from liability to serve as jurors, there is no reason, from the point of view of the English law, why Consular Officers should not be jurors. By the Juries Act, 1870, it is provided that an alien who has been domiciled in England or in Wales for ten years or upwards, if in other respects duly qualified, is qualified and liable to serve on juries or inquests in England and Wales as if he were a natural-born subject. However, it is clear, as Hall in his authoritative *Treatise on International Law*[1] justly points out, that Consular Officers must be conceded whatever privileges are necessary to enable them to fulfil the duties of their office. "These privileges must comprise," he adds, "immunity from any personal obligations, weighing under the local law upon private persons, which are incompatible with a reasonably continuous presence of the Consul at his office or with his ability to go wherever he may be called by his Consular duty. Thus it is held that Consuls are exempt from serving on juries, because such employment implies absence, and may compel them to travel to some distance from their official residence." It would, therefore, be advisable to incorporate in Consular Conventions the exemption of professional Consular Officers from serving on juries or inquests.

Control of Consuls over Mentally Defective Countrymen.—Another case in point is the helpless position in which foreign Consular Officers in Great Britain find themselves owing to the lack of any administrative power over those of their own countrymen who are mentally deranged. According to the Consular regulations of nearly all civilised countries, Consuls are the lawful guardians of minors, feeble-minded persons, and lunatics of their nationality who temporarily or permanently reside within their Consular district. Having to bear the responsibility of such duties, Consular officers ought to be in a position effectually to exercise them. Governments which have recognised the official character of Consuls by granting them the Exequatur, should place them in a position to fulfil their duties towards their own countrymen, otherwise their office becomes *nudum jus* without practical

[1] Sixth Edition, p. 312.

utility. As the matter stands now, Consular Officers are advised that they must charge persons of their nationality, whom they consider to be mentally deranged, before a local magistrate. This course cannot be considered satisfactory, as in such case the Consular Officer would find himself altogether in a false position, proceeding, as it were, against his countrymen. It seems, therefore, desirable that Consuls should be given the right of deciding whether any inquiry should be held by local administrative authorities into the state of mind of lunatics or feeble-minded persons of the Consul's nationality and, if the fact of their lunacy or feeble-mindedness be established, the Consul should be entitled to request those authorities to deprive the persons of their freedom until their restoration to health. The provision wanted would run as follows: "In case a foreign Consular Officer applies to the proper local authorities with the request that measures of precaution be taken in respect of Russian subjects who, in his opinion, are mentally deranged, the local authorities will arrange for the examination of the state of mind of such person, and if it is found that they are of unsound mind, they will have to be confined in a lunatic asylum to be kept there until they can be certified as sufficiently recovered to be able to be discharged without danger to themselves and others."

The above suggestions are, of course, open to any amendment or enlargement likely to improve them. They are put forward in order to show, in principle, the desirability for Great Britain of concluding Consular Treaties.

ADVERSE POSSESSION.

[*Contributed by* ALBERT S. THAYER, ESQ.]

Development of the Idea of Possession from the Idea of Inviolability of the Person.—The source of law appears to be the idea of the inviolability of the person, and the earliest development of law seems to have consisted in an extension of the meaning of the term person. In the beginning this extension of meaning probably followed common understanding. Theft was deemed wrongful (theft for instance of a coat or weapon habitually worn upon or attached to the body) because the *res* had, to common understanding, become part of the person. The coat was looked upon as a second skin, the weapon as a third hand, and to take either was deemed an attack on the person, just as, nowadays, the theft of a wooden *leg* might be thought of as an attack on the person. But, the notion once accepted that a thing like a coat or weapon, separable from the person, and often separated from it for shorter or longer periods of time, was nevertheless to be deemed part of it, judgments finding wrong came to be supported by finding other things much less closely connected with the person to be part of it, and this extension of meaning went on till a generalisation was attempted. The fact was recognised that protection was given to things not to common understanding part of the person, and a word was found for the connection between person and thing which made it wrong to deal with it—the word *possession*. As we should express it, the law came to take a distinction between things actually part of the person, and things "in law" part of the person, and things "in law," part of the person were said to be *possessed* by it. According to Savigny a violation of possession is to be deemed an injury to the person.[1] This, very likely, was once the accepted opinion, for the simple reason that a thing possessed was "in law" part of the person.

Possession and Magic.—The meaning indicated by the etymology of the word possession (and of the corresponding German word Besitz) is that of continuance of physical proximity, a derivation indicating a perception of the fact that things possessed were apt to be near the possessor. Nevertheless the fact of physical nearness does not serve to explain possession. How shall be explained this mysterious sense of duty which makes it wrong

[1] Perry's *Savigny on Possession*, p. 27: "The inviolability of whose" (the possessor's) "person extends to those sorts of disturbance by which the person might, at the same time, be interfered with." See also p. 329.

to attack the thing possessed? It is natural to attribute it to *magic*, to deem the *res* possessed by virtue of some spell imposed upon it, as do the natives of West Africa, whose property law, we are told, is simply a system of charms—said not to work altogether badly.[1]

The Explanation of Possession as a Dealing with the "Res" to the Exclusion of Everybody resulting from Taking.—The founders of our law were *rationalists*, however, and found another explanation. Possessing a thing, they said, was dealing with it to the exclusion of everybody, and a possessor possessed because he had *taken* the *res*, *i.e.* because he had been dealing with it to the exclusion of certain adversaries. We may imagine, I think, how this explanation came to be adopted. A seizes, holds and uses a piece of land. Marauders are kept off merely by physical barriers, displays of force, and fear of consequences. But A retains his hold, a *habit* of submission to his will is formed, and a disposition, a sense of duty, arises to respect his will to be unmolested. How does outsider B account for his mysterious disposition not to interfere with A's enjoyment? A's dealings with the *res* have created a certain expectation of continuance of his will to deal with it without molestation, and the disposition resulting from habit of submission to his will (a disposition deemed by B a dictate not of his own conscience merely, but of the common conscience) has created an expectation that his dealings therewith will not be hindered. The situation therefore exhibits a probability of recurrent unhindered dealings on the part of A which leads B to say he *is* dealing with the *res* to the exclusion of everybody else. I take up a pen, obviously unused for the moment. Nevertheless I say to the person at whose elbow it has been lying, "Are you using this pen?" A succession of dots does not constitute a line. Nevertheless we speak of a "dotted line," because the dots give the idea of a line. And, in the same way, an anticipation of recurrent dealings gives the idea of continuous dealing. In mid-winter I may say of certain meadows, "I am still getting hay from them," although I never go near them except for a few days in the summer. To this condition of continual dealing with the *res* to the exclusion of everybody B attributes A's right of possession, and therefore concludes that it constitutes his possession. In other words, a condition found to exist because of disposition to give the right of possession is found to give the right of possession. Possession, so conceived, is a fiction, a *moral* fiction. I may have during a period of time neither will nor power to deal with the *res*, but if "everybody would say" I was dealing with it during that period to the exclusion of everybody, I have been continuously in possession. A pigeon flies out of its house in the morning. Because of its known practice of returning in the evening, the owner is thought of as possessing it, as continuously dealing with it to the exclusion of everybody. He is "keeping pigeons." But if the swallow I have caged escapes, I am not, to common understanding, still dealing with it to the exclusion of everybody. I have

[1] Mary H. Kingsley's *West African Studies*, Macmillan, 1901, pp. 89, 407 *et seq.*

ceased to possess it. B moreover perceives that the reason why he deems A to possess—to be dealing with the *res* to the exclusion of *everybody*—is that for a period of time he has been dealing with it to the exclusion of *others*, and therefore concludes that A possesses the *res* because he has *taken* it. In some such way the idea that taking gives possession and possession the right of possession must have come to be accepted as a rule of law.

Reliance of Early Common Law upon the Idea that Taking gives Possession and Possession the Right of Possession.—Taking gives possession and possession the right of possession. This was the word delivered to the fathers of our law and received by them with all readiness of mind. Their right was, for the most part, right of possession or conferred by violation of possession, their possession a fiction, moral or merely legal, according as it did or did not conform to common understanding, a fictitious condition imputed because of disposition to find the right of possession—their *taking*, a term swollen to an enormous content by the exigencies of legal decision. Taking, rightful or wrongful, gave possession, and therefore the right of possession. In the time of Bracton, according to Maitland, the very act of casting out an owner gave the disseisor legal protection against strangers—four days' holding against the owner himself.[1] Ideas of conduct were conceived as incorporeal things, and successful pursuit of the defined course of conduct was deemed a taking of the incorporeal thing giving a right of possession thereof. A lord's rights over his vassals were rights of possession of incorporeal things acquired by taking, *i.e.* by compelling the obediences to which such compulsion rendered him entitled. His subjects were thought of as continually rendering specified obediences, and disobedience was deemed wrongful because a violation of a right of possession by cessation of obedience.[2] On the other hand a common man might possess an incorporeal thing as against his lord. "No freeman," says the Charter of Henry III., "shall be *disseised* of his free customs." An advowson was a right of possession of an incorporeal thing acquired by taking, *i.e.* by successful induction of one's nominee into enjoyment of the living. "In your writ of right of advowson," says Maitland, "you shall count that on the presentation of yourself or your ancestor a clerk was admitted—nay more, that your clerk *exploited* the church, took *esplees* thereof in tithes, oblations, and obventions to the value of so many shillings."[3] Taking appears to have been almost the only juridical fact. Promise and succession received no recognition. An heir had rights, not by succession to his ancestor, but because he was, in contemplation of law, the same person as his ancestor.[4] Gift gave no right. Taking was necessary to that. Gift was a mere permission to take, absolving

[1] Maitland's *Beatitude of Seisin*, 4 L.Q.R. pp. 29, 33, 34.

[2] Pollock and Maitland's *Hist. of Eng. Law*, vol. i, pp. 181, 182, 512, and vol. ii. pp. 3, 4, 128.

[3] Maitland's *Mystery of Seisin*, 2 L.Q.R. p. 490.

[4] Holmes's *Common Law* Lecture, X.

the taker from wrong. And to be valid even for this purpose special and conspicuous manifestations of the fact of permission to take were required, such as, if the *res* were land, a *livery* of seisin.[1] If I was bound to pay money it was not because I had promised payment. It was because I had, in the eye of the law, made my creditor owner of the money. If I failed to pay I was charged, not with violation of a promise, but with keeping the owner of the money out of possession of it. My creditor brought his action and declared that I had *deforced* him of his money.[2]

The Idea that a Wrongful Taking must be shown to maintain an Action for Recovery of Possession, and that therefore the Defendant in such an Action must have the Right of Possession.—An action for recovery of possession is an action against a possessor. In the early days of our law it was conceived that the defendant in an action for recovery of possession must have the *right* of possession. If the action had been regarded as a vindication of right to deal with the *res*, it would probably not have been so held. If we conceive that the plaintiff in ejectment, notwithstanding the defendant's right of possession, remains himself free to deal with the *res*, we need not suppose his action barred by proof that the defendant has no right of possession. The less the defendant's right the greater the plaintiff's. But an action for recovery of possession, in its origin, was not regarded as a vindication of right to deal with the *res*. It was deemed an action to punish a wrongful taking.[3] Two ideas were accepted. Taking gives the right of possession. Wrongful taking gives right to retake. The question arose: If taking from A gave B a right of possession against everybody, A included, how could A retain a right to retake? The problem was solved by supposing a proceeding to take *via legis* a proceeding to punish a wrongful taking. Actions for recovery of possession came to be regarded as actions against wrongful takers, and if an action for recovery of possession is to be deemed an action to punish a wrongful taking, then we must show a taking, with its consequent right of possession, to maintain it.

This requirement had awkward consequences. A, for instance, drives B out of his house and stations armed guards to keep him out. I may be disposed to give B a right to retake *via legis*, but indisposed to find that A has the right of possession. I have not the disposition to give A a right to non-interference which leads me to think of him as dealing with the *res* to the exclusion of the generality. I regard A as a wrongful taker, as dealing with the *res* to the exclusion of B, and therefore conclude that B must have his action. But I am disposed to deny A any right of possession, and, if I do, must conclude that he does not possess and therefore cannot have taken the *res*.

Escape from the Consequences of the Idea that the Defendant in an Action for Recovery of Possession must have the Right of Possession

[1] Pollock and Maitland's *Hist. of Eng. Law*, vol. ii, p. 84.

[2] *Ibid.* pp. 204, 205.

[3] See Pollock and Maitland's *Hist. of Eng. Law*, vol. ii, pp. 519, 572.

through Adoption of the Fictions of Ejectment.—Under English law the inconvenient consequences of this rule that a defendant in an action for recovery of possession must have the right of possession were successfully evaded through adoption of the fictions of ejectment. Nowadays we still think of a defendant in an action for recovery of possession as possessor, but we are not embarrassed by the notion that if possessor he must have the right of possession. If the action is brought against the tenant, we say the tenant has possession; if against the landlord, that the landlord has possession. It may be that under certain rules the landlord does not possess. Nevertheless, he possesses for the "purposes of the action." And if the action is brought against the tenant, and all persons whose rights to deal with or enjoy the *res* are the source of his, or have the same source as his, or have his for their source, landlord, reversioner, remainderman, sub-lessee, etc., we have no difficulty in regarding them all as together possessing as against the plaintiffs. Williams and Yates, in their book on *Ejectment*, say: "A person seeking to recover possession must sue the person who is in possession of the premises either by himself or his tenants. He may sue the landlord only, or only the tenant in actual possession, or both together. A mere servant in possession by permission of another is liable to be sued."[1]

In the infancy of the modern action for recovery of possession this was not the case. The defendant must possess the land in accordance with general common law doctrine. If I brought my action against the landlord and ignored the tenant, the landlord could defeat the action by showing he had not the right of possession.

The chief part in the old action of ejectment was played by an imaginary person called the "casual ejector." The action was brought against the casual ejector, and the possessor was notified to defend it, and the fundamental idea of the action was that if the possessor did not defend and judgment was entered against the casual ejector, the casual ejector was to be deemed, as against the real possessor, possessor for the purposes of the action, so that, whatever the sheriff did by way of execution of judgment against the casual ejector, the real possessor could not complain of any violation of his right of possession.

The obvious course, therefore, of a plaintiff in ejectment would appear to have been to notify everybody, who, it was apprehended, might possibly be able, if not notified to defend, to convict the sheriff of dealing with the *res* in violation of his right of possession. If everybody was notified, *and judgment was obtained against the casual ejector*, then no one notified could afterwards complain of violation of his right of possession by the sheriff. But any person notified who did undertake to defend was substituted for the casual ejector as defendant. And if he were not possessor, a judgment against him would not justify an execution as against the real possessor. Suppose, for instance, in a case of landlord and tenant, the plaintiff's lessor is

[1] Williams and Yates on *Ejectment*, 2nd ed. p. 207.

unable to determine whether the tenant is really a tenant or only a servant, and therefore notifies both to defend the action, and that the tenant makes default and the landlord defends. If the plaintiff's lessor succeeds, judgment against the landlord will not justify an execution as against the tenant. Moreover, to bring against any one an action for recovery of possession is to allege that he possesses, and if the landlord puts the plaintiff's lessor to proof of his possession, and the plaintiff's lessor fails, judgment shall be given against him. Not only, therefore, in the case last supposed would a judgment in favour of the plaintiff not justify execution, but the landlord, denying and disproving the allegation of his possession, would obtain judgment for costs against the plaintiff. A person bringing ejectment, therefore, was careful to serve his notices to defend on possessors and possessors only. It might be difficult to discover whether A was tenant or servant of B, but if he notified them both, and only the one who did not possess defended, judgment in his favour would avail him nothing, and, if put to proof of defendant's possession, failure to prove it would saddle him with costs.

A landlord, it was originally held, had nothing to say to an ejectment brought against his tenant. One could only defend an action for recovery of possession as possessor, and a landlord was not possessor. If his tenant saw fit to defend, he might assist him. If not, judgment went against the casual ejector, and the landlord had nothing to say to the action of the sheriff. Such a judgment might be obtained through neglect of the tenant to advise his landlord of the pendency of the action, or through refusal of the tenant to allow the landlord to defend in his name. A tenant might be *bribed* so to refuse, or to keep his landlord in ignorance of the pendency of the action, by the plaintiff's attorney. Nevertheless, according to Tidd, it appears to have been originally the rule that "if the tenant saw fit to allow a judgment against the casual ejector the landlord could not prevent it," and execution would be issued thereon. Later, however, a procedure was devised which, without obliging the plaintiff to prove the landlord a possessor, permitted the landlord to defend in his own name, and yet allowed to the plaintiff a judgment against the casual ejector, to justify, in case of execution, the sheriff's taking from the tenant. If the tenant, contrary to his landlord's wishes, made default, although judgment was entered against the casual ejector, execution thereon was stayed to give the landlord an opportunity of making the defence his tenant might have made.[1] If he failed, the stay was withdrawn, but not otherwise. In entering judgment the landlord was treated as if he were not a defendant. If the tenant defended, plaintiff obtained no judgment except against the tenant. If he did not, plaintiff obtained only a judgment against the casual ejector, and, on obtaining a verdict against his landlord, moved for leave to take out execution against the casual ejector.[2]

It remained the rule that a person notified to defend as tenant who was

[1] Tidd's *Practice*, 8th ed. p. 548. [2] *Ibid.* pp. 500, 501.

not tenant could defeat the action. Finally, however, the rule was adopted that any one notified to defend as tenant must, if he wished to defend, *admit* possession. Tidd says: "The lessor of the plaintiff was bound at the trial to prove the defendant in possession of the premises for which the ejectment was brought. But now, by a late rule of the Courts of King's Bench and Common Pleas, in every action of ejectment, the defendant shall specify in the consent rule for what premises he intends to defend; and shall consent in such rule to confess upon the trial that he ... was at the time of the service of the declaration, in the possession of such premises; and if, upon the trial, the defendant shall not confess such possession ... whereby the plaintiff shall not be able further to prosecute his suit against the defendant, then no costs shall be allowed for not prosecuting the same, but the said defendant shall pay costs to the plaintiff."[1]

That is to say, the defendants, made defendants as possessors in an action for recovery of possession, shall not be allowed to say they do not possess. The adoption of this rule facilitated the task of bringing an ejectment. The plaintiff might be uncertain whether A was servant or tenant of B. Nevertheless he could safely make him defendant as tenant. On the other hand, if A was a mere lodger or weekly tenant from whom no hostile action was to be anticipated, he could make B, the landlord, defendant as possessor, and not make A defendant at all.

The Action for Recovery of Possession made, through Adoption of the Fictions of Ejectment, an Action against an "Adverse Possessor" whether he has the Right of Possession or not.—So it came about that, in the action for recovery of possession, any one made defendant as possessor could not deny that he possessed. We may distinguish dealing with the *res* to the exclusion of one's adversary as *adverse* possession. As I have said, although disposed to give an action against an adverse possessor for recovery of possession, we may be indisposed to concede to him the right of possession. English judges, accepting the idea that an adverse possessor must have the right of possession, escaped its consequences as to actions for recovery of possession by making the possession of the defendant, whether adverse possession or possession giving right of possession, an immaterial fact. But an action for recovery of possession is *necessarily* an action against an adverse possessor. Actions for recovery of possession are brought against persons deemed to be adverse possessors, and the fictions of ejectment enabled them to be brought freely against persons possessing adversely to the common understanding, without regard to the rule of law that if adverse possessors they must have the right of possession. It may therefore be said that the effect of the fictions of ejectment was to make the action for recovery of possession an action against an *adverse possessor*, whether he had the right of possession or not.

When ejectment was abolished in 1875, an action also maintainable

[1] Tidd's *Practice*, 8th ed. p. 546.

against defendants without right of possession, the modern action for recovery of possession of land was substituted for it. The only possession necessary to the defendant in the modern action for recovery of possession, as in the later days of its predecessor, is *adverse* possession. Is this true of the modern action as it was true of ejectment, merely in the sense that a defendant in an action for recovery of possession must logically be an adverse possessor, or is it true in the sense that a plaintiff can be called upon to prove adverse possession on the part of his adversary? Consider, for instance, the case of *Trustees* v. *Short*.[1] An Australian "squatter," for a short time only, and at a remote period, had occupied wild land. Lord Macnaghten, speaking of the rightful owner, and of the subsequent period, said: "There is no one against whom he can bring an action." In the old days, if, after apparent abandonment by a squatter, I desired to fortify my title, I could bring ejectment against a casual ejector and notify the squatter to defend his possession, and the squatter could not say that he did not possess. And I think that nowadays, if, in the case supposed, an action for recovery of possession had been brought directly against the squatter long after he had left the land, he would have been deemed possessor for the purposes of the action, even if not deemed to possess adversely under the Statute of Limitations.

The Idea of "Disseisin" as necessary to support an Action for Recovery of Possession, and the consequent Adoption of the Fiction of Disseisin by Election.—In the early days of our law the idea was accepted that every action for the recovery of possession—the writ of right even—must *in some way* be an action to punish a wrongful taking, and, so far as possible, every action was made to conform to this theory. One device directed to that end was the fiction of *disseisin by election*. Blackstone says, for instance[2]: "Even in corporeal hereditaments a man may frequently suppose himself to be disseised, when he is not so in fact, for the sake of entitling himself . . . to an assize of novel disseisin. . . . The facility of that remedy induced others who were wrongfully kept out of the freehold to feign or allow themselves to be disseised merely for the sake of the remedy."

Suppose a deed to two as tenants in common. One of them enters and exploits the premises exclusively for his own benefit without recognition of his co-tenant's interests. Here is possession, adverse to the common understanding, and the tenant's entry, if the act of a third person, would have been deemed to amount to a wrongful taking. But, in the case supposed, because of the appropriator's right of entry, no wrongful taking was apparent, and it was held that the excluded tenant, to maintain an action, must show something more, he must show a wrongful taking—an *ouster*. If, for instance, *he* had been in peaceful enjoyment, and his co-tenant had entered in his absence, driven off his stock, removed his chattels, replaced them by his own, and

[1] (1888) 13 App. Cas. 793.

[2] *Commentaries*, 9th ed. vol. iii. pp. 170, 171.

taken up his residence in the house, this would have been held to amount to a wrongful taking giving an action for recovery of possession.

English judges accepted three ideas as to the action for recovery of possession. It is an action against an adverse possessor. It is an action against one with right of possession. It is an action against a wrongful taker. Accepting these ideas, they nevertheless found themselves disposed in certain cases where no wrongful taking was apparent to allow actions for recovery of possession against persons to common understanding possessing adversely. A lessee, for instance, holds on after expiration of his term, and refuses to surrender the possession to his lessor. Here the judges found it difficult to find a disseisin which would justify an action for recovery of possession. The only taking apparent to them was the entry on acceptance of the lease, and that was rightful. The difficulty was solved by adoption of the notion of *disseisin by election.* That is to say, in the case supposed, the action for recovery of possession was allowed, and justified on the theory that the lessor, choosing to bring the action, had, by bringing it, become disseised by his own election. By bringing the action he had created the disseisin necessary to its maintenance. A, for instance, purchases from a life tenant and remains in possession after the life tenant's death. Of this case it was said the purchaser "could only be a disseisor in one way—at the election of the owner of the freehold and inheritance."[1]

Adverse Possession without Disseisin, and Non-Adverse Possession. —We find this holding on after expiration of right referred to as *adverse possession without disseisin.* Of the case last stated, Abbott C.J. said there was no ground for saying that the adverse possession of the purchaser had operated as a disseisin of the son and heir. The purchaser "did not take possession wrongfully, he only wrongfully continued in possession."[2] And Mr. Justice Bayley said with reference to the same case[3]: "In order to bar the power of devising a right of entry, there must be an actual disseisin of the devisor; a mere adverse possession will not suffice."

It was found difficult, however, to regard possession in cases such as I have supposed as *adverse.* Statutes had been enacted limiting the time during which actions might be maintained for recovery of possession, and since, to common understanding, the right of action was lost through continuance of adverse possession, the period limited by the statute came to be regarded as the period of adverse possession. The period limited by the statute did not begin till accrual of the right of action, and therefore adverse possession, it was concluded, did not begin till accrual of the right of action. But, according to the theory of disseisin by election, the right of action did not accrue until the pursuer had, by bringing the action, manifested his election to be disseised and so *given* himself the right of action. Hence it was concluded

[1] *Cullen* v. *Doe d. Taylersen*, 11 A. & E. 1008, 1023.
[2] *Ibid.* 1022, 1023.
[3] *Ibid.* 1023.

that the possession of the defendant before the action was begun could not be adverse. So the possession which Abbott C.J. called adverse possession without disseisin came to be known as non-adverse possession, and, until the passage of the Act of 1833, this non-adverse possession, no matter how long continued, did not bar the right of action for recovery of possession. If my tenant held over my right of action for recovery of possession really accrued immediately; nevertheless, in the eye of the law, it did not accrue until I brought the action. Thereafter, therefore, and not till then, did the defendant's possession become adverse. For instance in *Nepean* v. *Doe*[1] the successor to a tenant *pur autre vie* brought ejectment against a purchaser from the tenant *pur autre vie*. Denman C. J. said[2] the defendant's possession was adverse on a certain date because an action had been brought and tried between the parties sometime before that date.

As the adverse possession of a tenant holding over after expiration of his term was deemed non-adverse, so, in the absence of "ouster," the adverse possession of one tenant in common exploiting the *res* for his exclusive benefit was deemed non-adverse. His co-tenant's right of action did not accrue till ouster, and therefore, until ouster, his possession must be non-adverse.

Vindication and the Modern Action for Recovery of Possession.—The common law, therefore, while accepting the idea that an adverse possessor must have the right of possession, came, through adoption of the fictions of ejectment, to allow actions for recovery of possession against adverse possessors without right of possession, and, while accepting the idea that a wrongful taking was necessary to support an action for recovery of possession, came, through adoption of the fiction of disseisin by election, to allow actions for recovery of possession against adverse possessors who had not wrongfully taken the *res*, and, through these developments, the common law action for recovery of possession came to have a certain resemblance to the action of vindication in which the *petitor* does not charge the *possessor* with any wrong, but merely alleges that the thing is his, and in which the defendant, although he must possess, need not have the right of possession.[3] Savigny quotes from the Digest as follows: "It is the business of the judge in this action" (vindication) "to determine whether the defendant possesses. Some regard the action as only dealing with that possession which entitles one to the interdicts *uti possidetis* or *utrubi*. I think, on the other hand, that the suit may be brought *against any one who holds the thing and has the power to restore it.*"[4]

Adverse Possession and the Limitation Act of 1833.—The Act of 1833[5] provided, in effect, that no entry should be made or action brought

[1] 2 M. & W. 894. [2] *Ibid.* 912.

[3] Perry's *Savigny on Possession*, p. 11: "In that suit" (vindication) "none other but a possessor can be the defendant. . . . The Roman law expressly lays down that vindication may be maintained whether the defendant is a juridical possessor or not."

[4] *Ibid.* pp. 57, 58. [5] 3 & 4 Wm. IV. c. 27.

to recover land except within twenty years after the right to make the entry or bring the action first *actually* accrued, and that whether the defendant's possession had been "adverse" or not was an immaterial fact. Its framers did not distinguish an adverse possession without disseisin, and say the fact of disseisin should be immaterial. They conceived a right of action for recovery of possession against a defendant who need not possess adversely. When did the right of action begin if not with the beginning of adverse possession? They declared it should be deemed to begin *either* with disseisin (which *would* make possession adverse) or with mere cessation of the possession of the pursuer—that it should be "deemed to have first accrued at the time of dispossession or discontinuance of possession."[1]

This notion, however, of a right to take accruing through mere absence of possession was not accepted. In *Smith* v. *Lloyd*[2] A conveyed land to B, reserving the coal. For many years the coal lay untouched till finally B, who had begun to take it himself, claimed that A's right to take it had been barred by statute inasmuch as he had been out of possession for over twenty years. Parke B. said, however[3]: "We are clearly of opinion that that statute" (the Act of 1333) "applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out of, and another *in*, possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, *whether adverse or not*, to be protected, to bring the case within the statute."

When Parke B. says the defendant in an action for recovery of possession must show actual possession, whether adverse or not, to bring the case within the statute, he means possession adverse to the common understanding. A right of action for recovery of possession is a right to take the *res* from one who is holding it adversely, and he says, in effect, that a defendant must possess adversely, but that if he is possessing adversely to the common understanding, it is immaterial, so far as the statute is concerned, whether he is possessing adversely under the technical rules as to non-adverse possession. And although Parke B. speaks of *two* conditions as necessary to the operation of the statute, it is the adverse possession of the defendant which constitutes his defence. His adversary need be out of possession only so far as adverse possession puts him out of possession. As Denman C.J. says, speaking of s. 2 of the Act[4]: "If one party has been in actual possession for twenty years" (*i.e.* has possessed adversely to the common understanding for twenty years) "whether adversely or not" (*i.e.* whether his possession has been technically adverse or not) "the claimant whose original right of entry accrued above twenty years before bringing the ejectment is barred by this section."

Nowadays, when the old law of "non-adverse" possession has been forgotten, we simply say, "Adverse possession gives the action for recovery of possession. Therefore adverse possession for the prescribed period, con-

[1] 3 & 4 Wm. IV. c. 27, s. 3. [2] (1854) 9 Ex. 562. [3] *Ibid.* 572.
[4] *Cullen* v. *Doe, d. Taylersen*, 11 A. & E. 1008, 1015.

tinuing my right of action for the prescribed period, shall terminate my right to take the *res*." The notion of an action for recovery of possession against a non-adverse possessor no longer perplexes us.

The Action for Recovery of Possession barred by Continuance of Adverse Possession, whatever the "Situs" of the Legal Right of Possession. —Under the statute it is continuance of adverse possession which bars the action for recovery of possession, whatever the *situs* of the legal right of possession. Suppose A makes a lease of mines to B, reserving the land, and B never enters thereunder. If we accept the idea that succession has nothing to do with possession, then, under English law, the right of possession remains with A, and if, after twenty years, B undertakes to take the *res*, A can say, "I have had a right of possession for twenty years. You have had only a right of entry." In *Keyse* v. *Powell*,[1] Campbell C.J. said of such a case that if B had never acquired possession under his lease, so that he had enjoyed, after delivery thereof, only a right of entry thereunder, his right of action for recovery of possession would have ceased after twenty years. On certain peculiarities of the case before him, Campbell C.J. found possession *had* passed to the lessee. And it is safe to say, of any such case occurring nowadays, that whatever our allegiance to the idea that succession has nothing to do with possession, we should not consider the lessee's right of action barred because of failure of the *right of possession* to pass from lessor to lessee. We should deem it barred only by *adverse possession* on the part of the lessor. Continuance of my adversary's right of possession does not affect my action for recovery of possession. He must show continuance of adverse possession. A person given the right of possession, as conceived to be dealing with the *res* to the exclusion of the generality, need not be conceived to be dealing with it to the exclusion of *me*. Take the case of *Trustees* v. *Short*.[2] The defendant, who had occupied wild land for a short period only, claimed title forty years afterwards by adverse possession. The colonial judges decided in his favour, the Privy Council against him. And Lord Macnaghten said, with reference to the claim of the defendant: "The rightful owner, on abandonment, is in the same position, in all respects, as he was before the intrusion took place." But was the *defendant*, after the cessation of adverse possession, in the same position as before the intrusion took place? Suppose that in the beginning he had entered into enjoyment as a *bona fide* purchaser under a forged deed, and tilled the land for a year or two, and had then left it. He would, I think, have acquired a right of possession continuing after his migration. The colonial judges, seeing an indefinite continuance of the right of possession, decided that he had acquired title by adverse possession. The Privy Council, seeing no continuance of adverse possession, concluded that his right of possession had been lost by abandonment; that the rightful owner was, on abandonment, "in the same position in all respects as before the intrusion took place." The solution of the problem, I take it, under

[1] 2 E. & B. 132. [2] 13 App. Cas. 793.

English law, is, that although the defendant's right of possession continued, his adverse possession did not, and therefore he had not acquired title to the land.

The Adverse Possession "giving" the Right of Action for Recovery of Possession, and the Adverse Possession "barring" the Right of Action for Recovery of Possession.—The Limitation Act of 1833 provides that the right of action for recovery of possession shall continue for a certain period only. As adverse possession is deemed necessary to the action for recovery of possession, the Act has been construed to provide that adverse possession for a certain period shall bar the action for recovery of possession. Logically, then, the rule that the right of action for recovery of possession shall continue for a certain period only, and the rule that adverse possession continuing for such period shall bar such action, are the same. Actually, however, they are not, for the reason that the term adverse possession in the rule that adverse possession shall give an action for recovery of possession has received a liberal construction, and in the rule that continuing adverse possession shall bar the action for recovery of possession a strict construction. Suppose, for instance, I own a tract of vacant land in an urban district. A market gardener enters, builds a hut, and dwells in the hut and tills the land for twenty years. All this without my knowledge. I have had throughout an action for recovery of possession. Nevertheless, if I finally do bring an action, it does not follow that the "squatter" shall have judgment as having possessed adversely for a prescribed period. His possession may not have been adverse under the rule that continuance of adverse possession shall bar the action for recovery of possession. In the first place the evidence of *dominion* is more or less inconclusive. He may have been in the position of a person occupying a reserved seat in the absence of the ticket-holder without intention of holding it against him when he turns up. And assuming manifestations of dominion, a question arises as to the fact of *submission* on my part. Can I be deemed to have submitted to the squatter's will, in view of the fact that I knew nothing of what was going on?

It cannot be said, therefore, that the rule of our law is the rule laid down by the statute that the right of action shall cease after continuance thereof for a certain period. The real rule is that the action for recovery of possession shall be barred by continuance of adverse possession for such period. The second rule is law, and it is not the same as the first. Take the case of *Lyell* v. *Kennedy*.[1] This was an action for recovery of possession brought against an appropriator of the rents of certain houses. One Ann Duncan, who owned the premises at the time of her death, died intestate in 1867. At the time of her death the houses were occupied by tenants under unwritten leases, one of them a tenant from year to year, the others weekly tenants, and they appear to have been thus held until the action was brought.

[1] (1887) 18 Q. B. 796; (1889) 14 App. Cas. 437.

The heirs of Ann Duncan remained unascertained during the period 1867-80. At the time of her death one Kennedy was acting as her agent in respect of the premises in question, collecting the rents, etc., and during the interval 1867-80 he continued to collect the rents and manage the property. Up to 1880 he assumed to act as agent for the unknown heirs. In 1880 and thereafter he claimed to own the property. In 1881 the heirs brought an action against Kennedy for recovery of possession of the land, to which he pleaded the Statute of Limitations. The Court of Queen's Bench found the action had been barred. The House of Lords decided it had not. After the death of Ann Duncan, and until 1880, Kennedy assumed to act for the unknown heirs. Nevertheless, the Court of Queen's Bench said, his conduct was unauthorised, and therefore gave an action for recovery of possession. His assumption to act for the owners was inoperative in the absence of ratification. The heirs' right of action, therefore, having continued for the statutory period, was barred by the statute. The House of Lords, on the other hand, felt that the possession of one assuming to act for the owner, even if he acted without authority, could not be adverse, and seeing no adverse possession in Kennedy until he claimed to be owner, held that until then no action for recovery of possession was maintainable against him, and that consequently the heirs' action was not barred by the statute. Until Kennedy claimed to be in receipt of the rents for himself Lord Selborne did not see how there could be an action against him for recovery of the land. The Court of Queen's Bench was right, I think, in finding that, so far as the heirs' right of action against Kennedy was concerned, it was immaterial whether he did or did not act for the heirs. His possession was adverse under the rule giving actions for recovery of possession against adverse possessors. Nevertheless, they should also have found that Kennedy's adverse possession had not continued for the statutory period under the rule that continuous adverse possession shall bar the action for recovery of possession. The House of Lords was right in finding that Kennedy's adverse possession had not continued for the statutory period. Nevertheless they were wrong in concluding that, until such adverse possession began, no action was maintainable against him for recovery of possession.

The New York statute of limitation of actions for recovery of possession of land [1] declares explicitly that proof of continuous adverse possession for a period of time shall entitle the defendant to judgment, and this is really the rule of English law, not the rule laid down by the Act of 1833, that the action shall be barred by continuance thereof for a certain period.

The Operation of Adverse Possession under English Law.—English law therefore recognises two kinds of possession—one, a condition giving right during its continuance; the other, called adverse possession, importing a continuing relation of dominion and submission, giving right

[1] Code of Civil Procedure, §§ 368–72.

because of its duration. The operation of this adverse possession under English law is not merely statutory. The wrongful appropriator of land no longer acquires forthwith the right of possession thereof. The conscience of the judge demands something more as a condition of the *jus possessionis*. I have referred to Maitland's statement that, in the time of Bracton, the very act of casting out an owner gave the disseisor legal protection against strangers.[1] This is not the modern law. "A trespasser," says Sir Frederick Pollock, "does not gain possession till there has been something like *acquiescence* in the physical fact of his occupation on the part of the rightful owner."[2] Whatever effect modern law may give to mere mastery, the ordinary condition of acquisition of the right of possession of land as against the will of owners is *adverse possession*. The submission of the owner to an adverse will which will eventually extinguish his ownership, gives in the beginning the right of possession to his adversary. Adverse possession must continue for a time to give the wrongful taker the right of possession of land. For how long the law does not tell us. "One year's possession under a lease," says Sir Frederick Pollock, "has been held to be enough" (to show acquisition of the right of possession), "though the lessor's title was not shown. Ten years' possession has been decisive even against several years' subsequent possession under colour of title."[3] Modern English law, that is to say, not only makes duration of adverse possession a condition of the wrongful taker's ownership, but also of his right of possession. It makes duration of adverse possession for an indefinite period a condition of his right of possession, and duration thereof for a longer and definite period a condition of his ownership.

Under early common law wrongful taking gave a right of possession both of corporeal and incorporeal things, which was conceived to be a right to non-interference as against *everybody*. The wrongful taker became an *owner* although his wrongful taking gave his adversary an *action*. Disposition to deny a wrongful taker any right to non-interference as against his adversary has operated to modify the law in two ways—in one way as to corporeal things, in another way as to incorporeal things. The wrongful taking of corporeal things now gives a right of possession which is not ownership. In the absence of adverse possession for the statutory period, the right of possession so acquired imposes no legal restraint upon the wrongful taker's adversary, who remains owner of the *res*. As to incorporeal things the notion that a right of possession must be a right as against everybody persisted, and disposition to deny a wrongful taker any right to non-interference as against his adversary led to abandonment of the idea of wrongful taking giving the right of possession of incorporeal things. Wrongful takers of incorporeal things, however, able to show "undisturbed use" for a period of time were given the benefit of a fiction of *gift*. Modern law therefore declares, in effect

[1] Maitland's *Beatitude of Seisin*, 4 L.Q.R. p. 33.
[2] Pollock on *Torts*, 6th ed. p. 371.
[3] Pollock and Wright on *Possession*, p. 96.

that, in cases of wrongful taking, the right of possession of incorporeal things shall only be acquired by adverse possession giving also ownership.

Modern English law, then, allows the wrongful acquisition of rights of possession and ownership of corporeal and incorporeal things by adverse possession. It makes an indefinite and relatively short period of adverse possession a condition of wrongful acquisition of the right of possession of land, and a definite and longer period of adverse possession a condition of wrongful acquisition of ownership thereof. But in the case of incorporeal things, adverse possession giving the right of possession also gives ownership.

Construction, under the "Jus civile," of the Rule that Taking gives the Right of Possession.—"The formulas of the Roman republican period," says Sir Frederick Pollock, "are already more modern and abstract than ours."[1] The *jus civile*, like the early common law, accepted the notion of taking giving the right of possession, and applied it freely in cases displaying only rightful dealings with the *res*. But under the *jus civile* to acquire by *wrongful taking* the right of possession, one must take by long and undisturbed use, and such acquisition left no right in the person wronged. The Roman law as to the effect of wrongful taking, therefore, begins, as we know it, at a point of development which our law appears to be approaching, but has not yet reached. If under English law it was now necessary to "take" to acquire by wrongful taking the right of possession of land, as it is necessary to take to acquire the right of possession of incorporeal things, *i.e.* by undisturbed use for a period of definite duration, instead of, as at present, by undisturbed use for a period of undefined duration, and if such acquisition, as in the case of the acquisition by wrongful taking of incorporeal things, was the acquisition of ownership as well as the right of possession, our construction of the rule that wrongful taking gives the right of possession of land would be much the same as that of the *jus civile*. It is absurd, the Institutes say, to bring an action, allege that a thing is mine, and ask to have it, if it shall appear that the defendant ought to give it to me, for if it is mine I have already taken it and he cannot give it to me.[2] This statement expresses the theory of the *jus civile*. Without distinguishing between possession and ownership, it founded its property law upon the notion that taking gave the right of possession but recognised no taking by wrong except "taking by use" making the taker owner. So the common law accepted the notion that taking gives the right of possession of incorporeal things, but now gives effect to no taking by wrong except "taking by use" making the taker owner. The common lawyer of to-day might speak of incorporeal things as the Institutes speak of corporeal things. He might say, "It is absurd to say an incorporeal thing is not A's although he has taken it, for if he has *taken* it, it *must* be his." According to the theory of the *jus civile*, if I had taken a thing, rightfully or wrongfully, it was mine. Hence, in

[1] *Expansion of the Common Law*, p. 14. [2] *Inst.* IV. 6, 14.

cases of wrongful taking, the "eye of the law," under influence of a disposition favourable to the person wronged making judges unwilling to deprive him of ownership, saw no taking except in cases of taking by use.

Construction of the Rule that Taking gives Possession under the Edict.—As our law is either "law" or "equity," so Roman law was either the *jus civile* or law embodied in the Praetor's Edict. For the Roman law of possession without ownership we must look to the "equity side" of Roman law, that is to say, to the Edict. Under the *jus civile* nobody had the right of possession until he had taken the *res*, and, if the *res* was another's, he was not deemed to have taken it unless he had "taken by use" or under gift. If we think of possession as a fictitious condition of dealing with the *res* to the exclusion of the generality, imputed because of disposition to give the right of possession, we may say that, in the eye of the *jus civile*, nobody had possession till he had so taken. To the common understanding, however, possession might be wrongfully acquired without such taking, and the *jus civile* in not recognising it was "inequitable." The Edict, therefore, undertook to give protection to those who possessed to the common understanding. We may say that at Roman law the possession recognised by the Praetor's Edict, as well as the possession recognised by the *jus civile*, was attributed to *taking*, but that in decisions under the *jus civile* the term taking was construed in one way, in decisions under the Edict in another. The *jus civile* recognised no taking of another's *res* except taking by use or under gift. But in decisions under the Edict the term taking was construed more liberally, as liberally as by the Plantagenet judges in applying their rule that taking gave possession.

Possession and Ownership under Roman Law.—A possessor was conceived to be a person dealing with the *res* to the exclusion of *everybody*, who therefore had a right of possession as against everybody. The finder of a lost article, for instance, if adjudged to possess it, was given a right of possession as against the owner. He who had taken "in law" was given an action to vindicate his right to deal with the *res*, and to this action a taking "in equity" giving a right of possession under the Edict as against the *petitor* was no defence. But, on the other hand, if I had taken "in equity," I had the benefit of various interdicts pronounced by the Praetor forbidding disturbance of my possession, and to actions under these interdicts a taking "in law," *i.e.* ownership, was no defence.

We conceive the owner of a thing to be the person free to deal with it as he chooses. Under modern English law a person deemed to be owner of a thing really is free to deal with it. Under Roman law, A, if entitled to judgment in vindication, was deemed owner. Nevertheless, if B had the right of possession under the Edict, A was not really owner—that is to say, he was not free to deal with the *res*. He had merely a right to be made free to deal with it through prosecution of vindication. As against one endowed with right of possession, the legal owner under Roman law occupied a

position analogous to that of equitable owner under English law, to that of a mortgagor, for instance, who, barred from dealing with the *res* because of the mortgagee's right of possession, might, nevertheless, through operation of a decree in equity, become the legal owner.

The Civil Law Doctrine of the Inseparability of Usucaption and Possession.—"*Usucapio*," the Digest says, "*est adjectio dominii* per continuationem possessionis *temporis lege definiti*."[1] In the eye of the *jus civile* usucaption was *not* a continuance of possession. It was a process of *taking*, the completion of which gave possession. But, in construing the Edict, a person "taking by use," *i.e.* dealing with the *res* to the exclusion of his adversary, was deemed to have taken it "in equity," and therefore to be possessor—dealing with it to the exclusion of everybody. On the other hand, since a possessor under the Edict was taken to be a person dealing with the *res* to the exclusion of everybody, it was assumed that he must be dealing with the *res* to the exclusion of his adversaries, *i.e.* if an adversary happened to be owner, taking by use.

Here arose a certain conflict between law and common sense. The possession found by common understanding is a condition of dealing with the *res* to the exclusion of the *generality*—a fictitious condition imputed because of disposition to give the right of possession, which may, therefore, be called a condition of *law*. To common understanding, a taker by use need not be possessor—there may be no disposition to give the right of possession to a person dealing with the *res* to the exclusion of the owner, and, on the other hand, there may be a disposition to give the right of possession to a person not, to common understanding, dealing with the *res* to the exclusion of the owner. But, under the civil law, takers by use must be possessors, and possessors must be takers by use. The common law notion of an "adverse possession" having an existence independent of the possession giving co-existing right of possession does not receive recognition.

The Question whether Possession is a Condition of Law or a Condition of Fact.—The operation of this conflict of law and common sense may be perceived in the legal conditions, under Roman law, of usucaption and the right of possession. The condition of dealing with the *res* to the exclusion of one's adversary may be described as a condition of *fact*. The fictitious condition of dealing with the *res* to the exclusion of the generality, imputed because of disposition to give the right of possession, may be called a condition of *law*. Finding only the condition of law, I may be disposed to find the right of possession without finding taking by use. A, for instance, takes title from a "squatter" on B's land, and enters under his deed, but, after a short period of use and occupation, leaves the premises, and thereafter has no dealings with them. At the end of twenty years I may be disposed to find the condition of law—to find that A is

[1] Holland's *Select Titles*, 148, 3.

still dealing with the *res* to the exclusion of the generality, and therefore has the right of possession—but not to find the condition of fact—that for twenty years A has been dealing with the land to the exclusion of B. But, under the civil law, if I find one, I must find the other. The operation of this contention of forces may be seen in the resultant rules of law.

A judge indisposed to find the right of possession may find it because of disposition to find taking by use. Take, for instance, the civil law doctrine of *possession of easements*, a notion no longer recognised by the common law. In a given case, feeling only the condition of fact, I may be disposed to find that one is taking by use and yet to deny him any right of possession. But under the civil law this disposition cannot be gratified. At common law a person in process of acquiring a right of way through unresisted assertion of will to pass, is in the position of one taking by use, but he has no right to non-interference till after completion of a period of enjoyment. But, at civil law, if a man is taking an incorporeal thing by use, he *must* have possession of it, and therefore a right of possession.

Again, a judge disposed to find the right of possession may deny it because of indisposition to find taking by use. The civil law denies the right of possession where the common law allows it—disallows it, for instance, after the *loss* of the *res*. Regarding possession as a condition of law, we have no difficulty in finding the right of possession unaffected by loss of the *res*. But how can the loser be deemed to be still dealing with the *res* to the exclusion of his adversary—how can he still be taking by use? The result of this consideration is the civil law rule that loss terminates possession.

Or suppose, A being possessor, some mandate that A's possession shall pass to B. I am disposed to find that B has the right of possession, but indisposed to find that he is taking by use. How can he be taking by use merely because of an order that he shall have possession? And if B is not taking by use, it follows, according to civil law doctrine, that he is not possessor, and therefore has no right of possession. This is the civil law rule. B does not possess till he has *taken* the *res*. Succession has nothing to do with possession.

On the other hand a judge, indisposed to find taking by use, may find it because of disposition to find right of possession. A slave, for instance, runs away, and is not heard of for a period of time. The difficulty of finding adverse possession is the same as in the case of a lost article. Nevertheless, the disposition to continue the right of possession dominates, and makes the master still a taker by use. We possess a fugitive slave, the Digest tells us, until some one else takes him, and until such taking the period of usucaption continues to run.[1]

Here may be seen the source of the disputes of civilians as to whether possession is a condition of law or a condition of fact. When, as in the case

[1] Holland's *Select Titles*, 132, 14.

of a lost article, we deny possession despite disposition to find the condition of law, we conclude that possession must be a condition of fact. When, as in the case of a fugitive slave, we find possession despite indisposition to find the condition of fact, we conclude that possession must be a condition of law.

Savigny tells us that under the *jus civile* continuance of possession might make one owner, but that mere possession did not give the right of possession.[1] Here he is thinking of possession as a condition of fact, and is saying, in effect, that under the *jus civile* one taking by use had no right of possession. But if we think of possession as a condition of law, the statement that under the *jus civile* mere possession did not give the right of possession is equally true, for it then becomes an assertion that under the *jus civile* the right of possession was denied despite a general disposition to give it, a fact sufficiently proven by the equitable provisions of the Edict.

Usucaption made by the Edict a Continuance of Right of Possession. —The effect of the Edict, therefore, was to change the nature of usucaption. Under the *jus civile* it had been merely a *taking*, a dealing with the *res* to the exclusion of one's adversary. Under the Edict it became a continuance of possession, of dealing with the *res* to the exclusion of everybody, and a question of taking by use became merely a question of continuance of right of possession. At common law, as I have pointed out, a question of adverse possession is what a question of usucaption originally was under the *jus civile*— of continuance of dealing with the *res* to the exclusion of one's adversary. He who relies on usucaption under the civil law need only show continuance of the right of possession. He who relies on adverse possession under the common law must show a continuance of dealing with the *res* to the exclusion of his adversary. The civil law appears to impose the easier task, for to infer a continuance of the relation of dominion and submission from a succession of more or less equivocal acts of user is a difficult matter. But it is to be borne in mind that under the civil law the right of possession is dependent on the existence of "adverse possession" as it is not at common law. It may be denied, for instance, because the loser of a thing cannot be thought of as still dealing with it to the exclusion of his adversary. The difficulty under the common law of saying whether adverse possession continues becomes under the civil law the difficulty of saying whether the right of possession continues.

The continuance of the right of possession which under the civil law extinguishes ownership is not, however, a continuance of adverse possession. Because of dominance of indisposition to find the condition of fact over disposition to find the condition of law, the civil law has rules making certain conditions of adverse possession necessary to the continuance of juridical possession. Under these rules escape, loss, abandonment, etc., put an end to possession. Nevertheless, because of dominance of disposition to find the

[1] Perry's *Savigny on Possession*, 5, 41, 42.

condition of law over indisposition to find the condition of fact, the civil law finds a possession which to common understanding is not adverse. To recur to *Trustees* v. *Short*.[1] There to common understanding, and by judgment of the Privy Council, adverse possession did not continue after migration of the occupant. But at civil law the right of possession of the occupant would not have ceased with cessation of his use and occupation. In the absence of disturbing circumstances, such as an ouster, it would have continued until he had in some way manifested his *will* that his possession should cease. "If I am retaining possession of a pasture in the forest," the Digest says, "because of my intention to remain possessor, and become insane, I cannot lose possession thereof so long as I remain insane, for a madman is incapable of determining possession by act of will."[2] The occupant living long enough without manifesting will to terminate his possession, the civil law would have given him title by usucaption without regard to the period of actual occupation, his possession would be deemed to have continued for the prescribed period, but such a continuance of possession would not be the continuance of adverse possession demanded by the common law.

The common law finds no impairment of right through mere continuance of another's right of possession, although the civil law finds ownership thereby extinguished. Both findings are reasonable, for at common law the right of possession of a wrongful taker is no right as against the owner, but at civil law it is a right as against the owner, and if he suffer it to exist for a long period of time without seeking the extinguishment thereof by resort to vindication he may well be deemed to have lost his ownership.

[1] 13 App. Cas. 793.
[2] Holland's *Select Titles*, 141, 27.

THE LAWS OF ZANZIBAR.

[*Contributed by* J. E. R. STEPHENS, ESQ., *Magistrate of the Courts of His Britannic Majesty and of His Highness the Sultan of Zanzibar.*]

ZANZIBAR is a British Protectorate, comprising the island of that name and the sister island of Pemba about fifty miles to the north. The Zanzibar Dominions originally included a large part of the mainland between Tunghi Bay on the south and Warsheikh on the north, and were governed by the Sultan of Muscat. On the death of Seyyid Said, however, in 1856 the African Possessions became independent under Seyyid Majid, his brother Seyyid Thuwein becoming Sultan of Muscat. In 1890 the coast-line between Rovuma and Wanga was ceded to Germany and the Benadir Coast to Italy in 1904. The remainder of the mainland Possessions, and the islands of Lamu, Manda, Patta, and Siwa, are leased to the Administration of British East Africa, and are under the Governor of that Protectorate. The history of Zanzibar was closely connected with the slave trade on the east coast of Africa during the last century, but the status of slavery finally ceased to be recognised in 1897 by a decree of Seyyid Hamoud, the father of the ex-Sultan. The present Sultan is Seyyid Khalifa bin Harub, who succeeded in November 1911, on the abdication of Seyyid Ali bin Hamoud.

Application of Law of British India and of the United Kingdom.—By the Zanzibar Order-in-Council, 1897, His Majesty's criminal and civil jurisdiction in Zanzibar is, so far as circumstances admit, to be exercised on the principles of, and in conformity with, the enactments hereafter-mentioned of the Governor-General of India in Council, and of the Governor of Bombay in Council, and according to the course of procedure and practice observed by, and before, the Court in the Presidency of Bombay beyond the limits of the ordinary original jurisdiction of the High Court of Judicature at Bombay, according to their respective jurisdiction and authority, and so far as such enactments, procedure, and practice are inapplicable, is to be exercised under, and in accordance with, the common law and statute law of England in force at the commencement of this Order. By this Order the following Indian Acts are applied to Zanzibar, namely:

Indian Lunacy Act; Indian Penal Code; the Whipping Act; the Indian Succession Act; so much of the Indian Post Office Act as relates to offences against the Post Office; the Indian Divorce Act except so much as relates to divorce and nullity of marriage; the Bombay Civil Courts Act; the Indian Evidence Act; the Indian Contract Act; the Indian Limitation

Act; the Code of Criminal Procedure; the Transfer of Property Act; the Code of Civil Procedure; the Prevention of Cruelty to Animals Act.

Any other existing or future enactments of the Governor-General of India in Council, or of the Governor of Bombay in Council are also applicable to Zanzibar, but they do not come into operation until such time as may be fixed by the Secretary of State. Any Acts of the Governor-General of India in Council or of the Governor of Bombay in Council, whether passed before or after the commencement of this Order-in-Council amending or substituted for any of the above-mentioned Acts, also apply.

The Court may construe any such enactments, with such alterations not affecting the substance, as may be necessary or proper to adapt the same to the matter before the Court. The Secretary of State may by Order direct by what authority any jurisdiction, powers, or duties are to be exercised or performed, and he may modify any provision of the above enactments relating to civil or criminal procedure, or to procedure in bankruptcy. Any such Order made by the Secretary of State must be published in Zanzibar and in India, in such manner as he directs, and takes effect from the date specified in the Order.[1]

The enactments described in the First Schedule to "The Foreign Jurisdiction Act, 1890," apply to Zanzibar as if Zanzibar were a British Colony or Possession, subject to slight modifications. So much of ss. 4 and 5 of the Fugitive Offenders Act, 1881, as relates to sending a report of the issue of a warrant, together with the information or a copy thereof, or to the sending of a certificate of committal and report of a case, or to the information to be given by a Magistrate to a fugitive is excepted, and in lieu of such information the person acting as Magistrate must inform the fugitive that in the British Possession or Protectorate to which he may be conveyed he has the right to apply for a writ of *habeas corpus* or other like process. So much of s. 6 of the above Act as requires the expiration of fifteen days before issue of a warrant is excepted. The British Agent, who is substituted for the Governor of a Colony in the Act, is not bound to return a fugitive offender to a British Possession unless satisfied that the proceedings to obtain his return are taken with the consent of the Governor of that Possession. For the purpose of Part II of the Fugitive Offenders Act, 1881, Zanzibar, the East Africa and Uganda Protectorates, British India, Mauritius, and all British Possessions and Protectorates in Africa south of the equator are to be deemed one group of British Possessions.[2]

The Secretary of State may by Order, published in such manner as he directs, declare that any of the laws or ordinances for the time being in force in any African Possession of His Majesty, and not inconsistent with this Order-in-Council, shall have effect and be administered in Zanzibar with such modifications as may be necessary.[3]

[1] Zanzibar Order-in-Council, 1897, s. 11.
[2] Order-in-Council, 1897, s. 12. [3] *Ibid.* s. 13.

The Foreign Jurisdiction Neutrality Order-in-Council, 1904, contains provisions similar to the British Foreign Enlistment Act, and prohibits any person subject to this Order, without the licence of His Majesty, accepting any commission or engagement in the military or naval service of any foreign State at war with any foreign State at peace with His Majesty, or equipping any vessel for that purpose. This Order extends to all persons and to all property subject to the following Orders-in-Council: The Muscat Order-in-Council, 1867; the Morocco Order-in-Council, 1889; the Persian Coast and Islands Order-in-Council, 1889; the Persian (Inland) Order-in-Council, 1889; the Zanzibar Order-in-Council, 1897; the Ottoman Order-in-Council, 1897; the Ottoman Order-in-Council, 1899; the Siam Order-in-Council, 1903; the China and Corea Order-in-Council, 1904; or any Orders-in-Council substituted therefor.

The Zanzibar Order-in-Council, 1906 (called "the Principal Order," see Zanzibar Order-in-Council, 1909, s. 1) repealed the Zanzibar Order-in-Council, 1897, the Zanzibar Order-in-Council, 1903; and the Zanzibar Order-in-Council, 1904, provided that where other provision is not made by Decree of the Sultan, countersigned by the British Agent, any law, practice, or procedure established by or under the said repealed Orders, and all Acts under any legislature in India in force in Zanzibar, are to remain in force until such other provision is made.[1] Consequently the above provisions of the Order-in-Council of 1897 are still in force.

The Zanzibar Order-in-Council, 1906, did not come into force until November 4, 1908.[2] The Order extends to British subjects, to British protected persons, to foreigners with respect to whom the Sultan of Zanzibar has decreed, or the Sovereign or Government whose subjects or citizens they are, or under whose protection they are, or are claimed as being, has, by Treaty or otherwise, agreed with His Majesty for, or consented to the exercise of jurisdiction by His Majesty, and to Zanzibar subjects in the regular service of such foreigners. This Order also extends to (*a*) the property and all personal or proprietary rights and liabilities in Zanzibar of persons subject to this Order; (*b*) British ships with their boats, and the property on board thereof; and (*c*) foreign ships belonging to persons who are, or if they were in Zanzibar would be, persons subject to this Order, so, however, that jurisdiction over such foreign ships shall not be exercised otherwise than according to the practice of the High Court in England in the exercise of jurisdiction over foreign ships. The Order also extends, in the cases and according to the conditions specified in the Order, to Zanzibar subjects and foreigners not otherwise subject to the Order.[3]

[1] Zanzibar Order-in-Council, 1906, s. 52.

[2] See Zanzibar Order-in-Council, No. 2, Art. I, and Notice published by British Agent, October 26, 1908.

[3] Zanzibar Order-in-Council, 1906, s. 6.

"British protected person" means a person (*a*) who, being a native of any place beyond the dominions of the Sultan of Zanzibar, which is under the Protectorate of His Majesty, is temporarily within the limits of this Order; or (*b*) who, by virtue of "The Foreign Jurisdiction Act, 1890," or otherwise, enjoys His Majesty's protection in Zanzibar. "Foreign" means a subject or citizen of a State in amity with His Majesty, other than Zanzibar, and any person under or claimed as being under the protection of the State. "Zanzibar subject" means a subject of the Sultan of Zanzibar.[1]

Constitution of Courts.—In Zanzibar there are two classes of Courts exercising both civil and criminal jurisdiction—namely, the civil and criminal courts of His Britannic Majesty exercising jurisdiction over the above-mentioned persons by virtue of the Zanzibar Order-in-Council, 1906, and the civil and criminal courts of His Highness the Sultan of Zanzibar exercising jurisdiction only over the subjects of the Sultan by virtue of the "Zanzibar Courts Decree, 1908." His Britannic Majesty's Court consists of a Judge and two Assistant-Judges, who try all civil actions in which a British subject or any other persons to whom the Zanzibar Order-in-Council, 1906, applies are concerned. There are also Magistrates of the British Court, who hear all criminal cases in which a British subject or British-protected persons are concerned. Consequently, whenever the plaintiff or defendant or prosecutor or accused is a British subject or British-protected person, the case must be tried in the British Court. This Court is termed the Court for Zanzibar. The Court is to apply the Decrees of the Sultan of Zanzibar, provided they have been countersigned by the British Agent, to all persons subject to the Order-in-Council.[2]

Where a person subject to this Order-in-Council is accused of an offence the cognisance whereof appertains to the Court for Zanzibar, and it is expedient that the offence be inquired of, determined, and punished in a British Possession, the accused may, under the Foreign Jurisdiction Act, 1890, s. 6, be sent for trial to Bombay.[3]

Where a subject of the Sultan is accused of committing an offence against any person subject to the Order-in-Council, there is no appeal to the High Court of Bombay.[4]

Under the Jurisdiction of Magistrates Decree No. 11 of 1910, which has been countersigned by the British Agent, criminal jurisdiction over all persons who are subject to the jurisdiction of the British Court is conferred upon the Magistrates of the British Court. A Magistrate has all the powers which are assigned to any Magistrate by the Criminal Procedure Code, or with which any Magistrate under the Criminal Procedure Code may be invested, either by the local Government or by the District Magistrate. A Magistrate has power to hear and determine any case which, under

[1] Zanzibar Order-in-Council, 1906, s. 3.
[2] *Ibid.* ss. 14, 16.
[3] *Ibid.* s. 17.
[4] *Ibid.* s. 16.

the Criminal Procedure Code, is triable by a Session Judge. Trials by a Magistrate are to be conducted in accordance with the provisions of the Criminal Procedure Code relating to trials by Magistrates and Session Judges, but no case is to be tried by jury or with assessors, or is to be committed to a higher Court. A Magistrate may pass any sentence authorised by law; but any sentence of death, or of imprisonment of twelve months or more, or of twenty-four strokes or upwards, or a fine of Rs. 300 or upwards, is subject to confirmation by the Judge of the British Court, that is, the Judge of His Britannic Majesty's Court for Zanzibar. In any case where the Criminal Procedure Code allows an appeal, the appeal is from a Magistrate to two Judges of the British Court, but if the Judge certifies that no more than one Judge is available for the purposes of the appeal, the appeal is to be heard and decided by such Judge sitting alone; and no appeal lies without special leave of the British Court where the sentence imposed upon a person who has been convicted is imprisonment for not more than one month, or a fine of not more than Rs. 50, or whipping only. Where the Judges composing the Court of Appeal are divided in opinion, the opinion of the senior Judge is to prevail. The powers of revision conferred by the Criminal Procedure Code upon the High Court are, so far as concerns the proceedings of a Magistrate, to be exercised by the Judge of the British Court. Subject to the provisions of ss. 390, 391, 392 (2), 393, 394, and 395 of the Criminal Procedure Code, a Magistrate may pass a sentence of whipping, not exceeding forty-eight lashes, instead of, or in addition to, imprisonment. The Judge of the British Court has power, either on his own motion, or upon a report of the Magistrate, or upon an application by the accused, to direct that a person shall not be tried by the Magistrate under this Decree, but shall be dealt with in accordance with the arrangements made by Art. 53 of the Zanzibar Order-in-Council, 1906.[1]

Now under s. 53 of the Zanzibar Order-in-Council, 1906, the Code of Criminal Procedure and other enactments relating to the administration of criminal justice in India applicable to Zanzibar at the commencement of this Order[2] shall have effect as if Zanzibar were a district in the Presidency of Bombay; and an Assistant-Judge shall be deemed to be the Magistrate of the District; the Judge shall be deemed to be the Session Judge; the High Court of Judicature at Bombay shall be deemed to be the High Court; and the powers both of the Governor-General-in-Council and of the local Government under those enactments shall be exercisable by the Secretary of State, or, with his previous or subsequent assent, by the Governor-General of India in Council. Provided, however, that no sentence of death passed by the Court for Zanzibar shall require confirmation by the High Court. Where a person entitled to appeal from any judgment or order passed in the exercise

[1] Magistrates' Jurisdiction Decree No. 16 of 1910.

[2] *I.e.* November 4, 1908, see *supra*, p. 605.

of criminal jurisdiction under this Order desires to appeal, he must present his petition of appeal to the Court for Zanzibar, and the petition must with all practicable speed be transmitted by the Court for Zanzibar to the High Court of Bombay, with certified copies of the charge (if any) and proceedings of documentary evidence admitted or tendered, of the depositions, of the notes of the oral testimony, and of the judgment or order, and any argument on the petition of appeal that the appellant desires to submit to the High Court. The Court for Zanzibar must postpone the execution of the sentence pending the appeal, and must, if necessary, commit the person to prison for safe custody, or admit him to bail.[1]

In cases of murder or culpable homicide, if either the death or the criminal act which wholly or partly caused the death happened in Zanzibar, a Court acting under the Order-in-Council has the entire jurisdiction over any person subject to this Order who is charged either as a principal offender or as an abettor, as if both the criminal act or the death had happened in Zanzibar. In the case of any offence committed on the high seas, or within the Admiralty jurisdiction, by any person subject to the Order-in-Council, who at the time of committing such offence was on board a British ship, or on board a foreign ship to which he did not belong, a Court acting under the Order-in-Council has jurisdiction as if the offence had been committed within Zanzibar. In cases tried under this Article no different sentence can be passed from the sentence which could be passed in England if the offence were tried there.[2]

Where it is proved that there is reasonable ground to apprehend that a person subject to the Order-in-Council, 1906, is about to commit a breach of the public peace or that the acts or conduct of a person subject to the Order are likely to produce a breach of the peace, or where a person subject to this Order is convicted of an offence before the British Court, the Court may if it thinks fit require him to give security to keep the peace, or for his future good behaviour. If he fails to give security, the Court may order him to be deported from Zanzibar to such place and for such period as the Court directs. Where it is shown by evidence on oath, to the satisfaction of the British Agent, that any person subject to this Order is conducting himself so as to be dangerous to peace and good order in Zanzibar, the British Agent may order that person to be deported to such place and for such period as he shall direct. But where the person is a foreigner, he cannot be deported without the concurrence in writing of the Consul of the State to which he belongs. There is no appeal against a deportation order. The person to be deported must be detained in custody until a fit opportunity for his deportation occurs. If any master of a ship, after a reasonable remuneration for the conveyance of a deported person has been tendered or paid to him, refuses to carry such person to the place named, he is liable to a penalty not

[1] Zanzibar Order-in-Council, 1906, ss. 54, 55.
[2] *Ibid.* s. 19.

exceeding Rs. 750. An order for deportation made either by the British Agent or the Court must be reported to the Secretary of State, together with a statement of the grounds on which it has been made; and if made by the Court must be reported in like manner to the British Agent.[1]

A warrant of arrest issued by a competent judicial authority in the East Africa Protectorate or in the Uganda Protectorate for the apprehension of a person who is accused of crime committed in that Protectorate may be backed by the British Court, and is then sufficient authority to any person named on the back of the warrant to arrest accused.[2]

Where an offender convicted before the British Court is sentenced to imprisonment, and the Court, proceeding under s. 7 of "The Foreign Jurisdiction Act, 1890," authority in that behalf being given to it, considers it expedient that the sentence shall be carried into effect elsewhere than in Zanzibar, the place shall be a place in the East Africa Protectorate, or a place in some part of His Majesty's Dominions out of the United Kingdom, or in one of His Majesty's Protectorates, provided the Government thereof consents that the offender may be sent thither.[3] The British Court may, by warrant under the hand of the Judge and the seal of the Court, cause the offender to be sent to Bombay in order that the sentence may be there carried into effect.[4]

Courts of His Highness the Sultan.—The Courts of His Highness the Sultan exist by virtue of the Zanzibar Courts Decree No. 8 of 1908. The supreme judicial authority is and remains vested in the Sultan as part of his ancient sovereign prerogative. The following Courts are established by the Decree:

(i) Supreme Court for the islands of Zanzibar and Pemba.
(ii) Court for Zanzibar and Pemba.
(iii) District Courts.
(iv) Assistant-Kadis' Courts.

The Supreme Court for the islands of Zanzibar and Pemba, called the Supreme Court of His Highness the Sultan, must sit at Zanzibar, and must consist of the Judge and the Assistant-Judges of the British Court and two Kadis, but one European member of the Court, together with two Kadis, shall form a quorum, and the two Kadis shall have no voice in the decision of the Court.

The Court for Zanzibar and Pemba consists, in criminal matters, of one of the European Magistrates sitting alone, and in civil matters of one of the Magistrates and of two Kadis, sitting as assessors. But where in any civil case before the Court for Zanzibar and Pemba the amount in dispute does not exceed Rs. 1,000, the Court may, when exercising original jurisdiction, consist of the Town Magistrate sitting alone. When the amount in dispute

[1] Zanzibar Order-in-Council, 1906, ss. 22, 24.
[2] *Ibid.* s. 26
[3] *Ibid.* 1909, s. 2.
[4] *Ibid.* 1906, s. 21.

does not exceed Rs.500, the Court for Zanzibar and Pemba shall exercise concurrent jurisdiction with the District Court.[1]

The Court for Zanzibar and Pemba shall ordinarily sit in Zanzibar, but sittings from time to time shall be held in the island of Pemba on such dates and at such places as the senior Magistrate shall direct. District Courts are held at various places in the islands of Zanzibar and Pemba. They are held by the Collectors, Assistant-Collectors, Liwalis, and Kadis. In the town of Zanzibar the District Court shall, in criminal matters, be the Court for Zanzibar and Pemba, and in civil matters shall consist of the Kadis.

The Acts of His Britannic Majesty's Governor-General of India in Council, known as the Indian Penal Code, the Code of Criminal Procedure, and the Indian Evidence Act, apply to all persons subject to the jurisdiction of the Sultan's Courts.[2] But in the application of these Acts, the Sultan's Courts shall also be guided by and have regard to the general principle of the law of the island, and to any native law and customs not repugnant to justice or morality.[3] For the purpose of facilitating the application of these Acts, the Court may construe any provision with such modification, not affecting the substance, as may be necessary to adapt the same to the matter before the Court. In civil matters the Law of Islam is declared to be the fundamental law of the Sultan's dominions.[4]

The Supreme Court must not exercise criminal jurisdiction except on appeal from the Court for Zanzibar and Pemba. The Court for Zanzibar and Pemba may pass a sentence authorised by law, but any sentence of death, or of imprisonment of twelve months or over, or of twenty-four strokes or upwards, or of a fine of Rs.300 or upwards, passed by that Court, is subject to the confirmation of the Judge of the British Court. The Court for Zanzibar and Pemba may award up to forty-eight strokes, but where the number exceeds twenty-four, the sentence has to be confirmed.

Criminal cases arising within the district of a District Court, but not being within the jurisdiction of that Court, must be tried in the Court for Zanzibar and Pemba. A District Court has all the ordinary powers of a Second-class Magistrate under the Code of Criminal Procedure, and may try any offence for which the maximum punishment is not more than seven years, but it may not pass any sentence exceeding six months, or award not more than eighteen strokes, or impose a fine not exceeding Rs. 200.

A Kadi or Assistant-Kadi appointed to hold a Court has all the ordinary powers of a Third-class Magistrate under the Code of Criminal Procedure, and may try any offence for which the maximum punishment is imprisonment for one year or less, and may pass a sentence of imprisonment for a term not exceeding one month, or impose a fine not exceeding Rs.50.[5] At the present time, however, the Kadis are not allowed to exercise criminal jurisdiction.

[1] Zanzibar Courts (Amendment) Decree No. 7 of 1910. [2] *Ibid.* No. 4 of 1911, s. 2.
[3] Zanzibar Courts Decree No. 8 of 1908, s. 8 (2).
[4] *Ibid.* ss. 9, 10. [5] *Ibid.* ss. 11-15.

No appeal lies without the special leave of the Supreme Court where the sentence imposed does not exceed one month only, or whipping only, or a fine of not more than Rs.50 only. The Judge of the British Court has all the powers of revision conferred upon the High Court by ss. 435 to 442 inclusive of the Code of Criminal Procedure.

In civil matters the Supreme Court exercises appellate jurisdiction only. The Court for Zanzibar and Pemba has unlimited jurisdiction in civil matters. District Courts have power to decide civil cases where the sum or value does not exceed Rs.500. An appeal lies from any decision given by a District Court, or by an Assistant-Kadi's Court, in the exercise of its civil jurisdiction, to the Court for Zanzibar and Pemba. An appeal lies from any decision given by the Court for Zanzibar and Pemba in civil matters, whether on appeal or not, to the Supreme Court, provided that the amount of value involved in the suit exceeds Rs.1,000, or that leave to appeal is granted either by the Court for Zanzibar and Pemba or by the Supreme Court.[1]

Other Laws.—Various Decrees, some signed only by the Sultan, and others signed by the Sultan and countersigned by the British Agent, have been passed during the last few years on a variety of subjects. Only those Decrees which have been countersigned by the British Agent are binding on persons subject to the jurisdiction of the British Court. A very useful collection of the Orders-in-Council and Decrees now in force in Zanzibar and Pemba down to December 31, 1911, has been compiled by Mr. John H. Sinclair, His Majesty's Consul in Zanzibar.

[1] Zanzibar Courts Decree No. 8 of 1908, ss. 31-37.

NOTES.

Workmen's Compensation in French Law.—The following notes have been contributed by M. C. Sansas, docteur en droit, and translated by Mr. M. F. T. Herchenroder:

"The law with respect to Workmen's Compensation in France is contained in the following statutes: April 9, 1898; June 30, 1899; March 22, 1902; March 31, 1905; and April 12, 1906. They apply to accidents to workmen employed in mines, pits and quarries, shops, loading and unloading, carriage by land and sea, the building trade, shipyards, manufactures, works wherein explosive substances are manufactured or made use of, or wherein use is made of machinery worked by motive power, and commercial undertakings.

"Discarding a system of compulsory insurance, the Legislature authorises (1) the recovery of medical, pharmaceutical, and funeral expenses; (2) in case of temporary disablement, the recovery of compensation, payable daily, and amounting to half the wages at the time of the accident; (3) in case of permanent disablement or death of the workman, the payment of an annuity to him or those dependent upon him respectively: the employer or the company which insures him is primarily liable for the payment of such annuity; but, in case of default, the Old Age Pension Fund (Caisse nationale des retraites pour la vieillesse) will discharge it, reserving the right to recover it from the debtor or defaulting company. The payment of such annuities is made out of a common fund constituted by means of a special tax levied on employers.

"When the employer ceases to carry on his business, whether voluntarily or through death, winding-up or bankruptcy, a capital sum representing his liability and payable into the National Pension Fund becomes due; on the other hand, so long as he continues to carry on his business, he is only bound to pay the compensation on its falling due; but he may, if he likes, pay into the National Pension Fund a lump sum representing his liability, and thereupon the Fund delivers to the creditor the title to a life annuity.

"If the employer desires to insure himself against the risk of accidents, he has the choice among the following courses: he may become member of a mutual insurance society controlled by the State, or he may take out a policy in an insurance company, the premiums whereof are fixed, and which likewise is controlled by the State; or he may join a guarantee

syndicate between employers which is authorised by the State, and pledges its members to contributory responsibility, or he may insure himself in the Accident National Insurance Fund (Caisse nationale d'assurances contre les accidents).[1]

"According to the synopsis published in 1912 by the review *L'Assurance Moderne*, mutual societies and syndicates have in the course of the year 1911 received premiums amounting to 40,879,774 francs, and paid out indemnities amounting to 44,052,293 francs. In that same space of time insurance companies with fixed premiums have received 95,557,028 francs, and paid out 101,450,773 francs. This statement is based on documents supplied to the Ministry of Labour (Ministère du Travail), in pursuance of the Ministerial Decree dated December 26, 1899. The deficit therein shown is due to manifold reasons.

"The increase in the expenses caused by the Legislation on Workmen's Compensation is chiefly owing to accidents resulting in temporary disablement. Before the law of March 31, 1905, the daily compensation equivalent to half the amount of the wages received at the date of the accident (*vide supra*) was not due before and until the fifth day after the accident; now, it becomes due as from the first day, if the disablement has lasted more than ten days. Ever since 1906 the effects of this new provision have made themselves felt in a way which it was easy to anticipate—cases of eleven days' disablement have increased from 3,037 to 6,799; cases of twelve days' disablement from 2,909 to 6,627; cases of thirteen days' disablement from 2,866 to 5,850; cases of fourteen days' disablement from 2,814 to 4,216.[2]

"Another source of the increase lies in the medical and pharmaceutical expenses which are allowed in cases of temporary disablement. Such expenses in 1908 amounted to 10,536,677 francs, and in 1910 reached the sum of 12,339,179 francs. According to insurance companies this abnormal increase must be ascribed to the fact that the workman is entitled to choose the medical practitioner he likes, *i.e.* the doctor who knows how to draw him to himself by more or less lawful means. Institutions have sprung into existence in Paris from which 'ambulance chasers' (rabatteurs) are sent out in search of injured people; the injured workman is allowed an abatement on some of the expenses, and compensation in cash or otherwise is made to him—true, the doctor's bill sent in at the end of the litigation will amply make up for it.[3]

"On several occasions the Courts have had to interfere: thus, in a judgment given on November 14, 1912, the justice of the peace of the fifteenth

[1] Report of M. Georges Paulet, Director of the Social Provident Insurance, at the International Congress on Workmen's Compensation held in Paris in 1900.

[2] Communication by M. Alfred Mayen, President of the Réunion des assureurs contre les accidents du travail, at the International Congress held in Rome in 1903.

[3] "Quelques causes de Déformation de la loi sur les accidents," par M. L. Delmas (*Bulletin des Assurances sociales*, Paris, 1912).

arrondissement of Paris states that Dr. X. handed a sum of five francs to the workman Roussel on the first day the latter called at his establishment, and a sum of fifty centimes on each subsequent call; in a judgment delivered on December 27, 1911, the justice of the peace for Nogent-sur-Marne declares that the workman was tended solely for the purpose of prolonging his disablement and medical and pharmaceutical expenses; in a judgment dated January 18, 1912, the justice for the fifteenth arrondissement of Paris sets forth that one of Dr. Y.'s attendants gave a sum of five francs to the workman Wenling, urging him to have himself attended to by Dr. Y.

"In an article which appeared in April 1911, the *Gazette du Palais* remarks that 'insured' injuries require a longer period of time for healing than 'uninsured' injuries—300 days instead of 43 for a simple fracture of a leg.

"The Seventh Chamber of the Court of Appeal in Paris was called upon on January 28, 1911 to decide a case which is noteworthy. A workman whose eye had been injured, but was completely cured, had fallen into such a state of despondency that he had been unable to go back to work. Experts stated that there were no general disturbances, no convincing symptoms of neurasthenia, and accordingly that he could not be regarded as suffering from traumatic neurasthenia; the Court held that the alleged complications had no proved relation to the injury and fixed the reduction of working capacity at 6 per cent. Indeed, that was an instance of a new complaint known under the name of *sinistrose*, in which the patient imagines that he is utterly incapable of doing any kind of work soever. There is no lesion, only inhibition of his will, distinct from any organic disorder but distinct also from what is properly called shamming. Besides these victims of auto-suggestion, whose number ever augments though the Courts cannot in each case diagnose their case as being *sinistrose*, we have the category of shammers. Here are some of their devices as revealed in the Law Reports.

"Mathurin is engaged at Rouen by the Société nouvelle des Apparaux. One fine morning he declares that he has sprained his left wrist, leaves his work and gets a medical certificate delivered to him, which states that he is suffering from a disablement which will last a few days. He claims twelve days' half wages, amounting to thirty-three francs, and on the Society refusing to give him more than ten francs, summons the Society before the Court to recover the balance. The Society holds out, an inquiry is directed, and it is found that three days after the accident, Mathurin was working in the employment of the Compagnie des Entrepôts et Magasins Généraux.

"Trochu worked in Paris in the employment of Morel, who was insured in a company; on October 1, 1912, he stated that he had injured himself, left his employer, and two days later entered the employment of Corbery, who was insured in the *Caisse commune*. After an hour's work, he declared that he had just been injured. For a month he drew half his wages from the *Caisse commune*. In the meantime he had served a notice on his former

employer claiming half the wages due to him in consequence of his former injury; unfortunately, the scheme failed and Trochu was sentenced to four months' imprisonment by the Eleventh Chamber of the Seine Tribunal.

"On June 8, 1910, Deriot, a tiler in Paris, is thrashed and robbed in the neighbourhood of the fortifications. Being desirous to have the injuries which he had suffered certified as being the result of an accident in the course of his employment, Deriot visits his friend Chaney, who impresses upon him the necessity of securing false witnesses. Deriot sets about it and finds in Dr. Y.'s establishment, mentioned above, two kind-hearted *pals* who swear that they saw him fall down a ladder. Their testimony was, however, rebutted by that of other witnesses to whom Deriot had narrated the truth, and in the end his claim for compensation was dismissed.

"In passing the law on Workmen's Compensation, the object of the Legislature has been to create a system of social assistance, and consequently it has, in case of the workman's death, protected those that were dependent for their maintenance on his earnings:

"(*a*) The surviving spouse, unless divorced or judicially separated, is entitled to a life annuity provided the marriage took place previous to the accident. In case of remarriage, the spouse ceases to be entitled to the annuity, but three instalments are allowed in one sum in full satisfaction of his or her claim.

"(*b*) Legitimate children and such illegitimate children as have been legally recognised before the accident, if under sixteen, are likewise entitled to an annuity which varies according to their number from 15 to 40 per cent. of the annual earnings of the deceased. If the children have lost both their father and mother, each one of them is entitled to an annual sum of 20 per cent. of the annual earnings.

"(*c*) If the deceased left neither spouse nor child within the meaning of paragraphs *a* and *b*, each of his ascendants or descendants who were dependent upon him will be entitled to an annual sum equal to 10 per cent. of the annual earnings of the deceased, but the amount of all such annual sums together is not to exceed 30 per cent. of the annual earnings.

"These provisions are considered inadequate by Workmen's Syndicates. Their delegates at the twenty-fifth Miners' International Congress, held at Alais in April 1913, expressed the wish that relations who have become necessitous some time after the death of their descendant or ascendant should be entitled to the indemnity which would have been due to them if they had been in need at the date of the accident. Further, M. Broutchoux, delegate of the Northern Syndicates, asked that the woman dependent upon a miner, although not his lawful wife, should be entitled to compensation.

"Are these reforms thus demanded likely to be conceded by the French Parliament? We think not: the French Parliament at the present time has too much else to do to undertake the amendment of a system which it took eight years to build up."

Comparative Law in Blue-Books.—Two-thirds of the report for 1912-13 relating to the Self-governing Dominions (Cd. 6863, 1*s.* 5*d.*) are devoted to the legislation passed in the Dominions; and there are, in addition, forty-five pages of Appendix containing the text of statutes—so that, in due course, much of the matter with which it deals will receive consideration in the annual review of legislation published in this Journal. In the meantime some notes recording the action taken by legislation since the last Imperial Conference may be extracted:

Further steps have been taken to carry out the resolutions of the Imperial Conference of 1911. In accordance with the fourth resolution, in favour of uniformity of laws, the Commonwealth of Australia and Newfoundland, in 1912, passed Acts adopting, in the first case with certain modifications to meet local conditions and in the second case without alteration, the Imperial Copyright Act of 1911. These Acts will permit in due course of the Berlin Copyright Convention of 1908 being applied to Australia and Newfoundland. The Commonwealth Parliament has also legislated, by Act No. 19 of 1912, with regard to trade marks, with a view to bring the law into closer conformity with that of the United Kingdom.

As a result of the Interdepartmental Conference which was held to discuss the question of the legislation required to enable provision to be made for deserted wives and children, the draft of a proposed measure to be introduced into the Imperial Parliament is under consideration. In the meantime, with regard to Australia, action against desertion has been rendered easier by the passing of an Act, No. 18 of 1912, by the Commonwealth Parliament simplifying the enforcement of proceedings in such cases, and by legislation (Act No. 2401) in Victoria, and (Act No. 30 of 1912) in Western Australia.

Further correspondence has taken place with regard to naturalisation, and the views of the Government of Canada have been received. The Bill has now been re-drafted so as to meet the suggestions made by the self-governing Dominions, and has been forwarded to those Governments for approval.

The eleventh resolution, in favour of uniformity in the law of accident compensation, has been further carried into effect by legislation in the Commonwealth (Act No. 29 of 1912) and in Western Australia (Act No. 69 of 1912).

Legal Status of the Dead.—Professor Schreuer has kindly supplied the following summary of his paper at the Historical Congress, more fully set forth in the *Zeitschrift der Savignystiftung für Rechtsgeschichte*, xxxv. (1913):

"According to Teutonic ideas, and indeed a belief universally held, man continues to live after death. Speaking from the juridical point of view, his capacity for rights and his disposing capacity remain unimpaired. The dead body can be honoured, insulted, punished. The marriage tie lasts beyond the grave; the dead is owner of his grave (as his home) and of all his fortune.

"This is most strikingly so in Roman law. The dead paterfamilias remains owner of his whole estate; the heir, as it were, absorbs, and continues his personality. So also with the Teutons; the dead does not die, but he remains owner, especially of his house, and master of it, but not over the

whole estate, part of which, during his lifetime, belongs to the family as a whole. Nor is the dead concerned with current legal business, which devolves upon the heir. The dead has indirect possession (mittelbare Gewere), the heir direct possession (unmittelbare Gewere). Inherited real property cannot be sold by the owner, not on account of his children, but because it has come to him from the dead who holds a share in the ownership. In course of time the dead as indirect owner is bought off.

"Natural religion and ancestor-worship coalesce, perhaps especially through the influence of the hearthfire. Religion becomes interwoven with the human and legal aspects of ancestor-worship, the domestic authority partakes of a religious, superhuman character. The deity is owner of its sacred grove, its temple, its treasures, the animals within its precincts, also the private temples, are property of the godhead. The priest is not proprietory owner. But he is direct possessor *quâ* official and steward. The deity is only indirect owner. On the other hand the master of the house also possesses the rights of the ancestors and the gods. The peace of the house is not the peace of its master, but a sacral peace. The sacredness of boundary-stones shows the sacral root of real property. In private and in public law it is the god-ancestor who rules, and whose advice is asked by kings, State priests, and the paterfamilias. Their commands are commands of the god-ancestors."

Jurisdiction over Foreigners.—In the September number of *Recht und Wirtschaft*, Professor Kohler deals in drastic terms with the jurisdiction assumed by some German Courts over foreigners, and criticises strongly their tendency to assert jurisdiction in cases in which it is unjust. He contends that they may claim to adjudicate upon questions between foreigners and natives in a surprising manner. The circumstance that there is any property, however small, belonging to the foreigner within the jurisdiction, is enough, it is said, to found jurisdiction; according to Professor Kohler, if an umbrella is left behind, or a pair of stockings is found in the stranger's hotel, he may be sued for millions. There is even a more surprising result of the policy which Professor Kohler reprobates. A sues B, a foreigner, who has no property within the jurisdiction; B sets up the defence of want of jurisdiction and naturally claims the costs of the unfounded suit. The Court then says, "You, B, a foreigner, are really a plaintiff: you are making a claim; you must give security for costs." Another writer in the same number, dissatisfied with the present German procedure, advises that, with a view of its improvement, competent lawyers should be sent to Austria, France, England, and perhaps also to America. He also contends that a proper system of legal statistics is an essential of reform.

New Employment for Women.—At a time when Roumania is associated chiefly with measures of war and *haute politique*, its new departures in legislation are apt to be forgotten. Of these not the least striking is the new law (June 1913) establishing a *Conseil supérieur de l'industrie domestique*. Its

functions are varied and important; for example, to give advice respecting laws and all matters affecting home industries; to study the means of promoting them; to prepare measures relating to schools and workshops, so as to encourage theoretical and practical knowledge affecting domestic industry; to devise means for finding markets, etc., for the produce of this industry. Art. 4 states that the Conseil supérieur de l'industrie domestique is composed of thirteen female members nominated by royal decree from those "qui auraient témoigné une grande sollicitude au développement de l'industrie domestique roumaine."

The late Chief Justice O'Connor.—"The premature death of this eminent judge," writes a correspondent, "is a misfortune to the Empire. Born in Sydney in 1851, educated at the Sydney Grammar School and at Sydney University, and called to the New South Wales Bar in 1876, he acquired a large common law practice which included a good deal of experience in criminal prosecutions; he took silk in 1896; was appointed a member of the Legislative Council of New South Wales in 1887, and remained a member until the establishment of the Commonwealth; he was Minister of Justice in the Dibbs Government from 1891 to 1893. His most important public work was done in connection with the movement which led to the federation of the Australian Colonies in 1901. Elected a member of the Federal Convention in 1897, he at once took a leading position as a member of the drafting committee. This committee had functions which do not correspond exactly with those of any part of the existing Parliaments, though the creation of some such body as an ordinary part of parliamentary machinery has often been suggested. It was a revisory body charged essentially with the *form* as distinguished from the *policy* of the matters contained in the Constitution. Every report from other committees, and every amendment adopted by the House, was taken into consideration by the committee from the draftsman's point of view; while from time to time the committee brought up textual amendments of its own. On the establishment of the Commonwealth, Mr. O'Connor was elected a Senator for New South Wales, and on the establishment of the High Court of Australia in 1903, he was appointed one of the three justices of that Court, an appointment which had been anticipated by and met the cordial approval of professional opinion. In 1905 he became the President of the Commonwealth Conciliation and Arbitration Court, an office filled by a Justice of the High Court, and held the post until the appointment of two additional justices in 1906, when the work fell upon the junior member of the Bench. As President, the learned justice had to deal with the complex relations of employers and employed under an Act which, in his own words, 'laid down no principle, nor has it afforded directly or indirectly any guide. The whole matter is left absolutely to the discretion of the Court.' The selection was a fortunate one, and it is no disparagement to his legal learning to say that it is as the *vir pietate gravis*, weighing facts and

arguments, that his judicial reputation has been built. On the full Bench he was slow to form a final opinion during argument, and slower to disclose it to counsel; and many forensic battles before an evenly divided Court have been fought to secure his, the determining, opinion."

Indirect Damages.—Writers in the German legal reviews are much divided as to a recent remarkable decision with far-reaching consequences. A newspaper published a statement of a libellous character respecting A. B., who was in feeble health. He was so much shocked upon reading it that his health was much impaired. Could he recover damages for this injury? One Court at least has said that he can; and not a few lawyers seem to take the same view. The reasoning upon which an English Court would exclude this form of damages does not satisfy some foreign jurists. The consequences of the validity of such a decision seem startling, and not confined to defamation. Why, as one writer suggests, should not newspapers be liable for the consequences to the health of their readers of the publication of erroneous information? To put a case suggested by Herr Ebner, why should not a mother who has read in a newspaper that her son was drowned, and who is brought to the verge of death by this false news, recover the expenses thereby incurred. If there is to be liability for *Körperverletzung durch einem Zeitungsartikel*, the Courts will go far.

Unfair Competition.—We have received from Mr. de Becker, the well-known authority on Japanese law, the text of a draft Bill prepared in Japan with respect to unfair competition. It is substantially based on the German law of 1909 with a like object, and is intended to meet cases of fraud and deception not covered by copyright, patent, or trade marks legislation. Some of the provisions are not much more comprehensive than our common law; but others are far more severe than our law, common or statutory, and give remedies to persons who might not with us be able to take proceedings. There is no provision exactly similar to the general provision in the German law which prohibits all conduct in the way of competition "contrary to good faith." But the terms of the Bill are so sweeping as to make actionable or penal most of the ordinary tricks of advertisers. The punishments proposed are very severe; for example, penal servitude for three years. Everywhere, it would seem, there are legislative efforts to raise the standard of commercial morality.

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